1986 CASE DIGEST INDEX

Editor's Note: The cases in the Index have been classified to conform to the Criminal Law Digest (third edition).

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PART I—STATE CRIMES

1. VALIDITY OF CRIMINAL STATUTES IN GENERAL

§ 1.05 Statute held void for vagueness

Indiana Defendants were indicted for neglect of dependents. The pertinent part of the statute under which defendants were indicted defined neglect as "knowingly or intentionally" placing a dependent "in a situation that may endanger his life or health." Defendants argued that the word "may" made the statute unconstitutionally vague. The trial court dismissed the indictment on the ground that the relevant section of the statute was too vague to be enforceable.

The Indiana Supreme Court reversed and remanded, ruling that the statute was unconstitutionally vague, but that its meaning could be construed through a less literal reading, specifically the elimination of the word "may." The court stated that "a court in reading a statute for constitutional testing, may give it a narrowing construction to save it from nullification, where such construction does not establish a new or different policy basis and is consistent with legislative intent. . . . The purpose of the statutory provision here is to authorize the intervention of the police power to prevent harmful consequences and injury to dependents." In this case, defendants had been accused of neglecting dependents by placing them in unsanitary conditions, which not only "may" have endangered them but posed a real risk to their safety. Although the word "may" made the statute too broad to interpret literally, the statute's intent was clear, nonetheless. Rationally, the meaning of the statute was obvious, that is, to place a dependent in a life-threatening situation constitutes neglect. State v. Downey, 476 N.E.2d 121 (1985), 22 CLB 77.

§ 1.15 Severability of statutes

Oregon Defendant was convicted of prostitution under a Portland city ordinance that provided for a minimum penalty for that offense. There was no minimum penalty for prostitution under Oregon state criminal law. Prior to trial, defendant moved to dismiss the charge on the ground that the city ordinance defining and prohibiting prostitution and the minimum penalty provision were incompatible with state law. The trial court granted defendant's motion to dismiss, and the city appealed. The court of appeals agreed with the trial court's ruling that the city's mandatory minimum penalty provision was invalid, but found that the invalid penalty provision was severable from the issue of the legality of the city ordinance defining and prohibiting prostitution. The court of appeals, accordingly, reversed the trial court's dismissal and remanded the case for trial. Both defendant and the city appealed.

The Oregon Supreme Court, en banc, held that the minimum penalty provision in the city ordinance was incompatible with state law, but that the penalty provision was severable. The court, citing Invancie v. Thornton, 443 P.2d 612, *cert. denied*, 393 U.S. 1018, 89 S. Ct. 623 (1968), recognized the principle of statutory construction that an unconstitutional part of a statute may be excised without destroying a separable part, and stated that this principle may be applied to a city ordinance as well. In this case, the court ruled, there was nothing in the relevant city ordinance indicating that the city governing council intended that if the mandatory minimum penalty were held to be unconstitutional, the provision defining and prohibiting prostitution would be invalidated. The prohibitory ordinance, stated the court, was "not so essentially and inseparably connected with and dependent upon the mandatory minimum penalty provision, that it is apparent from the text or the legislative history that it would not have been enacted without the mandatory minimum provision." Further, "the prohibitory ordinance is neither incomplete nor incapable of being executed absent the mandatory minimum provision. . . ." Thus, the court affirmed the severance. City of Portland v. Dollarhide, 714 P.2d 220 (1986), 22 CLB 488.

3. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 3.28 Bank-related crimes

North Dakota Defendant was charged with issuing checks without sufficient funds. The trial court judge dismissed the criminal complaint on the ground that a 1981 bad check statute, as amended in 1983 to provide a payment defense, had previously been ruled unconstitutional, in effect decriminalizing the activity prohibited by the statute. The state appealed the dismissal.

The North Dakota Supreme Court reversed the trial court and remanded the case for further proceedings. The 1983 amendments did not repeal but instead amended and reenacted the 1981 bad check statute by adding unconstitutional language. The unconstitutional provision to provide a payment defense was found to be inseverable, thus, this rendered the 1983 statute a nullity, thereby leaving intact the 1981 statute until its valid repeal or amendment. State v. Clark, 367 N.W.2d 168 (1985), 22 CLB 175.

§ 3.70 Conspiracy

New Jersey Defendants were convicted of conspiracy to commit robbery and robbery, with separate and consecutive sentences imposed for both offenses. The crimes of which they were convicted involved two separate incidents, one involving a café robbery and the other a motel robbery. The crimes were also committed by two other persons, whose trial was separated from that of defendants. Defendants were convicted of involvement in the motel robbery, but acquitted of participation in the café robbery. On appeal, they argued that the crimes of conspiracy to commit robberty and robbery should have been merged into the completed crime of robbery.

The New Jersey Supreme Court affirmed and held that the conspiracy conviction should have been merged into the substantive, completed crime of robbery. Under the New Jersey Criminal Code, offenses will not merge if a proven conspiracy has criminal objectives beyond the particular offense proven. In this case, however, there was no evidence that the conspiracy had other criminal objectives than the completed robbery of which defendants were convicted. State v. Hardison, 492 A.2d 1009 (1985), 22 CLB 180.

§ 3.80 Drug violations

Georgia Defendants were convicted of keeping or maintaining a dwelling or other structure or place used for keeping or selling controlled substances, a felony punishable by imprisonment for not more than five years or a fine of not more than $25,000, or both, under the Georgia Controlled Substances Act. They were convicted of using a double-wide house trailer located on a used car lot as such a dwelling. The trailer was used as their home, and they owned the used car lot on which it rested. When the premises were searched pursuant to a warrant, law enforcement officers found, among other things, the following: scales; three boxes of ziplock plastic bags; a bag of brown paper bags; a canister of lactose containing a quantity of cocaine equivalent to less than one part per million; a pocketbook containing three ounces of marijuana; a grocery bag with numerous empty prescription bottles in it; and two baggies containing a residue of marijuana totaling 2.7 grams inside a decorative wood stove. Defendants were also convicted of the misdemeanor possession of less than an ounce of marijuana, but they were not convicted of possessing any other drugs. On appeal, defendants argued that the trailer was not maintained as a place for keeping or selling controlled substances.

The Georgia Supreme Court held that in order to support a conviction for maintaining a residence or other structure or place for keeping or selling controlled substances, the evidence must show that one of the purposes for maintaining such a structure was the keeping of a controlled substance. The mere possession of limited quantities of a controlled substance within the residence or structure is insufficient to support such a conviction. Although drugs and drug paraphernalia were found in the residence, defendants were not convicted of possessing anything other than less than one ounce of marijuana, and there was no evidence of any drug use in the trailer. Under the circumstances, the evidence was insufficient to find that defendants had knowingly engaged in continuing conduct

in which they kept or maintained their trailer for use as a place for keeping or selling controlled substances. Barnes v. State, 339 S.E.2d 229 (1986), 22 CLB 484.

§ 3.265 Intoxicated driving

New Hampshire Defendant was charged with negligent homicide for causing the death of another person as a result of his operating a motor vehicle while under the influence of intoxicating liquor. At a hospital after the incident, defendant was given a blood alcohol test which showed him to be under the influence of intoxicating alcohol. He was subsequently arrested and charged. At trial, defendant moved to suppress the result of the blood alcohol content test on the ground that the state failed to comply with the informed consent prerequisites to admissibility of the test as evidence. The state, on the other hand, argued that the requirements did not apply to felonies outside the motor vehicle code.

The New Hampshire Supreme Court held that the prerequisites of the informed consent law applied to defendant even though he was charged with a felony offense, negligent homicide. A New Hampshire state statute regarding the administration of sobriety tests provides that before any such test is given, the law enforcement officer must (1) inform the arrested person of his right to have a similar test or tests made by a person of his own choosing; (2) afford him an opportunity to request such additional test; and (3) inform him of the consequences of his refusal to permit a test at the direction of the law enforcement officer. The law goes on to state that "if the law enforcement officer fails to comply with the provisions of . . . [the statute], the test shall be inadmissible as evidence in any proceeding before any administrative officer and court of this state." In this case, the investigating officer did not inform defendant before the administration of the test of his rights and opportunities and the consequences of his consent or refusal to take the test. Thus, the result of the test could be suppressed. State v. Dery, 496 A.2d 357 (1985), 22 CLB 171.

§ 3.285 Larceny

Indiana Defendant was convicted of two counts of theft for the unauthorized use of a computer for his own purposes. Defendant was employed by the City of Indianapolis as a computer operator. In that capacity, he had access to a computer terminal and a portion of the computer's information storage capacity for utilization in performing his duties. While still employed in this position, defendant became involved in a private sales venture, and he began using the computer and its "library" to store records associated with his private venture. He was eventually discharged from his post for unsatisfactory job performance and for engaging in his personal, private business activities during office hours. He was subsequently charged with nine counts of theft for the use of the city's computer for personal interests. On appeal, defendant argued that he did not commit theft in that he took no property or value away from the City of Indianapolis by the use of its computer facilities.

The Indiana Supreme Court held that defendant's use of a city-leased computer for personal gain did not constitute theft, in that he did not take any value or property away from the city by his actions. The court ruled that there was insufficient evidence that defendant's conduct removed any part of the value of the computer, since the computer service was leased to the city at a fixed charge regardless of how much it was used; the tapes or discs used by defendent for personal gain were erasable and reusable; and defendant's utilization of the computer for his own venture did not interfere with its proper use by others. Although defendant did benefit from the use of the city's computer services, he did not deprive the city of any of its property, and thus, did not commit theft. State v. McGraw, 480 N.E.2d 552 (1985), 22 CLB 171.

§ 3.355 Rape

§ 3.365 —Consent

Georgia Defendant filed a pretrial general demurrer and a motion to dismiss the indictment charging him with rape and aggravated sodomy of his wife. They were living together as husband and wife at the time. The trial court denied the motion. Defendant contended on appeal that there exists within the rape statute an implicit marital exemption that makes it legally

impossible for a husband to be guilty of raping his wife.

The Georgia Supreme Court found that no implicit marital exemption exists within the rape and aggravated sodomy statutes. The court's decision was based on the dramatic changes in women's rights as well as the status of the marriage contract that have taken place since the time when the common-law attitude toward the status of women and marriage considered a wife to be merely her husband's chattel or an extension of his person. The court stated that these old concepts and the theory of implied consent to spousal rape conflict with the Georgia Constitution and statutory laws. There had never been an expressly stated marital exemption included in the Georgia rape statute, and the statute never included the word "unlawful," which has been widely recognized as signifying the incorporation of the common-law spousal exclusion. With this legal background, the court was convinced that no woman today would knowingly include an irrevocable term in her revocable marriage contract that would allow her husband to rape her. Warren v. State, 336 S.E.2d 221 (1985), 22 CLB 290.

4. CAPACITY

§ 4.00 Alcoholism and drug addiction

Florida Defendant was convicted of first-degree felony murder based on arson. He set fire to an apartment building in which his girl friend lived, and the fire eventually resulted in the death of one person. At trial, defendant requested that the jury be instructed as to the defense of voluntary intoxication. The trial court refused to do so, ruling that because arson is not a specific-intent crime, such a defense is not available against a charge of first-degree felony murder based on the underlying felony of arson. Defendant appealed his conviction, arguing that he should have been allowed to enter a defense of voluntary intoxication.

The Florida Supreme Court held that the defense of voluntary intoxication did not apply to a general-intent crime such as arson. The court ruled that voluntary intoxication applies only to specific-intent crimes. The court held that the statutory definition of arson does not differ from the common-law definition in regard to the requisite intent, and under these definitions a specific intent to burn is not required. Accordingly, arson is a general-intent crime, for which voluntary intoxication is not available as a defense. Linehan v. State, 476 So. 2d 1262 (1985), 22 CLB 292.

Maine Defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor. After leaving a nightclub, he passed out in his car in the parking lot. He was awakened by a police officer, who ordered him to move his car. Defendant told the police officer that he was too drunk to drive, but the police officer insisted. Defendant proceeded to start his vehicle, and drove off. Some minutes later, the same police officer stopped defendant, administered sobriety tests, and arrested him for driving while under the influence of alcohol. At trial, defendant claimed that he was induced to drive while under the influence of alcohol by the police officer, and requested that the issue of entrapment be presented, but the trial court refused to instruct the jury on the defense of entrapment.

The Supreme Judicial Court of Maine vacated the guilty verdict and remanded the case. The trial court had refused to instruct the jury on entrapment because it claimed to see no evidence of a "scheme, device, subterfuge or lure" on the part of the police officer. The appellate court, however, stated that these are not the only elements of entrapment that a defendant can show. "Entrapment may also be found where government agents, acting under color of apparent authority, order or sanction the activity that comprises the offense for which the defendant is subsequently arrested." Moreover, "all that is necessary for the issue of entrapment to be generated is for the record to disclose evidence of entrapment of such nature and quality as to warrant a reasonable hypothesis that entrapment did occur. Once this is accomplished, the burden shifts to the State to prove the absence of entrapment beyond a reasonable doubt." Further, "inasmuch as the evidence in the case . . . was sufficient to generate the issue of entrapment, it was reversible error to fail to instruct the jury on entrapment." State v. Bisson, 491 A.2d 544 (1985), 22 CLB 84.

Nevada Defendant was convicted of lar-

ceny from the person. He was arrested as a result of a policy decoy operation designed to lure "dishonest" people to commit criminal acts in a downtown area of Las Vegas frequented mostly by homeless people. The incident in question began when defendant, such a "street person," walked down the street and happened to see the police decoy. The decoy officer, disguised as a vagrant, was slumped against a tree, pretending to be drunk and asleep. Protruding prominently from a breast pocket of his jacket was a ten-dollar bill, displayed in such a way, the decoy later testified, so as "to provide an opportunity for a dishonest person to prove himself." Defendant saw the decoy, and evidently went over to help him. Defendant tried to "awaken" the "vagrant," in order to warn him that the police would arrest him if he did not get up and move on. The police decoy did not as yet respond, and defendant began to step away. At this point, it was established at trial, defendant saw the ten-dollar bill sticking out of the decoy's pocket, reached down and took it. He was thereupon arrested by the decoy and two other police officers who had been hiding nearby. On appeal, defendant argued that the police officer's activities were improper, and that he was the victim of entrapment.

The Nevada Supreme Court reversed defendant's conviction. The police decoy portrayed himself as susceptible and vulnerable, he did not respond when defendant attempted to wake him, and, moreover, the decoy displayed the ten-dollar bill in a manner calculated to tempt any needy person to commit a crime, whether predisposed to the crime or not. There was no evidence that defendant had any intention of committing larceny when he first approached the decoy. In fact, he initially went to the man's aid. The court further stated that "even after being lured into petty theft by the decoy's open display of currency and apparent helplessness . . . [defendant] did not go on to search the decoy's pockets or to remove his wallet," further evidence of a lack of disposition to commit the crime. The activities of the police created an "extraordinary temptation" which, thus, constituted impermissible entrapment. Oliver v. State, 703 P.2d 869 (1985), 22 CLB 172.

Nevada Defendant was convicted of two counts of unlawful sale of marijuana and one count of maintaining a place for the sale of marijuana. He sold the marijuana to a police informant who acted as a decoy. The decoy was a prior acquaintance of defendant, who had himself faced two counts of cheating at gaming. He was incarcerated awaiting disposition of those charges when he decided to become a confidential informant. Under a plea bargain agreement, the informant pleaded guilty and was subsequently sentenced to time served. After his release, the informant, working with Nevada authorities, approached defendant to enquire about the availability of marijuana, which he told the police he had seen in defendant's apartment. Defendant initially told the decoy that he had none to sell, but when the decoy told him that he needed some to relax because of his recent jail term, defendant agreed to supply marijuana to the informant. Defendant then sold the decoy some marijuana. The decoy and the officers next arranged to make another transaction. Although defendant repeatedly told the decoy that he did not have any more marijuana to sell, he finally relented and told the decoy that he could get some from another source. He took the decoy's money and returned with marijuana for the informant, who made the buy. Defendant was subsequently arrested and charged. At trial, defendant argued that he was entrapped into selling marijuana to the informant.

The Nevada Supreme Court held that defendant was entrapped into the offense. Entrapment as a matter of law exists when the evidence shows that the state furnished an opportunity for criminal conduct to a person without such criminal intent. The court ruled that, in the present case, defendant lacked the requisite criminal intent, as evidenced by his initial reply to the informant that he did not have any marijuana to sell. Defendant only agreed to sell marijuana to the decoy when the decoy persisted in his request. The court ruled that when the police target an individual for an undercover operation, there must be reasonable cause to believe that the individual is predisposed to commit the crime. In this case, there was no evidence that defendant had a predisposition to commit the crime before he was targeted for the undercover operation. Shrader v. State, 706 P.2d 834 (1985), 22 CLB 291.

6. DEFENSES

§ 6.20 Entrapment

Florida Police undertook a decoy operation in a high-crime area. An officer posed as an inebriated indigent, smelling of alcohol and pretending to drink wine from a bottle. The officer leaned against a building near an alleyway, his face to the wall. Plainly displayed from a rear pants pocket was $150 in paper currency clipped together. Defendant Cruz and a woman passed by the officer after 10 P.M. Defendant approached the decoy officer, may have said something to him, then continued on his way. Ten minutes or so later, defendant and his companion returned and defendant took the money from the decoy's pocket without harming him in any way. Officers then arrested defendant as he walked away from the scene. The decoy situation did not involve the same modus operandi as any of the unsolved crimes that had occurred in the area. Police were not seeking a particular individual, nor were they aware of any prior criminal acts by defendant. In prosecution of defendant for grand theft, the trial court granted defendant's motion to dismiss based on entrapment. On appeal, the district court reversed on the ground that the appropriate test for entrapment is subjective.

The Florida Supreme Court reversed and the majority adopted the following threshold objective test of an entrapment defense: Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity. The "subjective" view of entrapment, apparently favored by a majority of the U.S. Supreme Court, focuses just on the predisposition of an accused; it permits convictions even where law enforcement agents have employed impermissible methods if it can be shown that, for example, the defendant has previous convictions for similar offenses. Rejecting this approach, the majority stated that the state must make an initial showing that the police conduct did not fall below commonly accepted standards. After the validity of the police activity has been established, the issue of the defendant's subjective predisposition may properly be submitted to the jury. "In other words," the court reasoned, "the court must first decide whether the police have cast their nets in permissible waters, and, if so, the jury must decide whether the particular defendant was one of the guilty the police may permissibly ensnare." Cruz v. State, 465 So. 2d 516 (1985), 22 CLB 295.

§ 6.27 Insanity

California Defendant was convicted of second-degree murder. He pleaded not guilty by reason of insanity, but the trial court found, after a jury was waived, that he was sane at the time of the offense. In finding defendant sane, the judge acknowledged that it was more likely than not that defendant suffered from paranoid schizophrenia, which played a significant part in the killing. For more than a century, California courts defined insanity as a mental defect that prevents a defendant from either (1) knowing the nature and quality of an act "or" from (2) recognizing that the act is wrong—the *M'Naghten* test. In 1978, however, the California Supreme Court, in People v. Drew, 583 P.2d 1318, adopted the broader definition proposed by the American Law Institute, which focuses on whether the defendant has "substantial capacity" either to appreciate the wrongfulness of an act or to conform his conduct to the requirements of the law. As a result of the 1982 voters' initiative known as Proposition 8, the langauge of *M'Naghten* was reinstated with one exception; instead of the disjunctive "or," the two prongs of the test are separated by the conjunctive "and" (Cal. Penal Code § 25(b), hereinafter Section 25(b)). Read literally, therefore, Section 25(b) would strip the insanity defense from an accused who, by reason of mental disease, is incapable of knowing that the act he was doing was wrong. This was the interpretation adotped by the trial court. On appeal, defendant claimed that the purpose of the electorate in adopting Section 25(b) was to restore the *M'Naghten* test as it existed prior to *People v. Drew*. Defendant further contended that a literal reading of Section 25(b) would violate both the state and federal constitutions by imposing criminal responsibility and

sanctions on persons who lack the wrongful intent (mens rea) essential to criminal culpability.

The California Supreme Court, en banc, reversed the conviction and found that the electorate intended to restore the traditional *M'Naghten* test of insanity as it was prior to 1978 (i.e., the defendant could be found insane either if he did not know the nature and quality of his act or if he could not distinguish moral right from wrong). The majority pointed out that the drafters of the proposition and the electorate did not intend to abrogate such a fundamental principle without there being some indication of this in the summaries and arguments submitted to the voters, which were silent on the point. If a major change from *M'Naghten* had been intended, the ballot materials would have contained something more than a simple switch of the word "or" to "and." Therefore, the change was construed to be inadvertent. People v. Skinner, 704 P.2d 752 (1985), 22 CLB 289.

Michigan The first defendant in this case was convicted of first-degree murder but mentally ill. The second defendant was found guilty but mentally ill on charges of armed robbery and assault with intent to commit robbery while armed. In 1975, the Michigan legislature established the jury verdict of "guilty but mentally ill." On appeal, both defendants argued that this verdict denied them the due process of law guaranteed by the Fourteenth Amendment. The first defendant further argued that the danger of jury compromise due to the existence of this verdict caused him to waive his right to a jury trial and, therefore, he should be allowed to challenge the constitutionality of the verdict. Thus, the question on appeal was whether the inclusion of the guilty but mentally ill verdict is so confusing to a jury that it denies a defendant a fair trial.

The Michigan Supreme Court ruled that the statutory verdict of "guilty but mentally ill" fully satisfies the demands of due process. Under the statute, the jury must engage in a two-step inquiry. The majority of the court concluded that a jury is able to comprehend the distinctions made by the legislature between the concepts of mental illness and insanity. The distinction was found to be "no more subtle or difficult" than others that juries are called on to make. In short, the court said, the legislative distinctions between mental illness and insanity did not deny defendants due process of law by denying them their right to a fair trial. People v. Ramsey, 375 N.W.2d 297 (1985), 22 CLB 288.

§ 6.30 Necessity

New Jersey Defendant was charged with possession of marijuana. Defendant, a quadriplegic, claimed "medical necessity," and asserted that he used the marijuana to relieve spasticity associated with quadriplegia. Defendant claimed that this defense, which provided standards for determining whether conduct that would otherwise constitute criminal conduct was justifiable by reason of necessity, was available under a New Jersey statute. The relevant section of the statute cited by defendant, which deals with necessity and the discretion left to the courts in that regard, reads as follows:

> Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislation purpose to exclude the justification claimed does not otherwise plainly appear.

The State appealed the use of this defense.

The New Jersey Supreme Court held that defendant could not assert a statutory defense of medical necessity because: (1) his conduct was prohibited by law, since marijuana is classified as a controlled dangerous substance; (2) other state code provisions dealt with the specific situation involved in this case (i.e., exceptions to the law); and (3) the state legislature had expressed an intent to exclude the justification alleged, as clearly appeared from statutory language permitting the possession of marijuana pursuant to a valid prescription, which defendant did not have and never attempted to get. State v. Tate, 505 A.2d 941 (1986), 22 CLB 489.

PART II—STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

8. PRELIMINARY PROCEEDINGS

§ 8.60 Right to counsel

Arizona Defendant was arrested and charged with driving while under the influence of intoxicating liquor or drugs while his license was suspended, revoked, or refused, and driving with a blood alcohol level of .10 or more while his license was suspended, revoked, or refused. After his arrest, defendant was taken to a police station, where he asked to call his attorney. This request was granted and defendant left a message with his attorney's answering service. About fifteen minutes later, the attorney called defendant at the police station and asked to have a confidential phone conversation with him. Defendant was allowed to talk to his attorney on the telephone, but a police officer remained in the room and refused to leave. The police officer stood close enough to defendant to hear some of the phone conversation. The attorney was unable to ask defendant certain questions about defendant's condition and conduct prior to his arrest because of the proximity of the police officer. Without this information, the attorney was unable to advise defendant how to proceed. Subsequently, defendant submitted to a breath test. Defendant later moved to dismiss the charges against him on the ground that he was deprived of his right to counsel because he was not allowed to consult with his attorney in private. The state claimed that defendant had no right to consult with an attorney before deciding whether to submit to a breath test.

The Arizona Supreme Court, en banc, held that defendant was denied his right to counsel when he was not allowed to confer with his attorney in private, even though he was not entitled to consult with counsel prior to deciding whether to submit to a breath test. The state may not prevent an accused from consulting with counsel when such access would not unduly delay the driving-while-intoxicated investigation and arrest, including a breath test. Once defendant began talking to his attorney, in this case by telephone, he had a right to privacy and confidentiality as long as such right did not impair the investigation or the accuracy of a breath test. In this case, the short time between when defendant asked to speak to his attorney and the eventual administration of the breath test would not have severely impaired the [illegible] of the breath test or the rest of the investigation. Defendant was, therefore, denied his right to counsel by the police officer's refusal to leave the room during the attorney-client phone conversation. State v. Holland, 711 P.2d 592 (1985), 22 CLB 386.

10. PRETRIAL MOTIONS

§ 10.00 Motions addressed to sufficiency of indictment

§ 10.15 —Severance

New Jersey Defendants were charged with murder and possession of a weapon with intent to use it unlawfully. Defendants, who were brothers, had made statements implicating each other, but only one of them had confessed to the crime. The other brother claimed to have been much less involved in the killing, although he was at least an accessory after the fact, according to a statement made to police. The state attempted to have defendants tried together, but they sought separate trials.

The New Jersey Supreme Court held that when the confession of any co-defendant involving any other co-defendant cannot be effectively excised, they should receive separate trials. The statement of a co-defendant against another co-defendant is inadmissible hearsay and violative of defendant's Sixth Amendment right to confront witnesses. Implicatory statements of a defendant are not admissible just because the statements are to some extent corroborated by inculpatory statements made by the other defendant. The court stated that its concern in this case was "preventive" and not "remedial" action, since the decision was made in the context of pretrial proceedings, and not after a jury verdict. In the interests of justice, therefore, defendants should have their trials severed from each other. State v. Haskell, 495 A.2d 1341 (1985), 22 CLB 178.

13. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 13.25 Defendant's silence while in custody

Connecticut Defendant was convicted of felony murder. At trial, defendant was cross-examined by a prosecutor as to his failure to make either a prearrest or postarrest statement to police in regard to his role in the crime. Defendant had submitted himself to the custody of the police, but, on the advice of counsel, exercised his right to remain silent, not answering a question regarding a car owned by defendant that was found at the murder scene. In addition, defendant failed to respond to the prosecutor's questions as to defendant's actions when he found out that he was wanted. At trial, the prosecutor pointed to this silence as evidence of defendant's culpability. Defense counsel objected that the question constituted an impermissible comment on defendant's right to remain silent by pointing to the fact that defendant had never given a statement to police. Defendant cited Doyle v. Ohio, 426 U.S. 610, 617-618, 96 S. Ct. 2240, 2243-2244 (1976), which held that a postarrest silence is ambiguous in meaning, because it may be nothing more than the exercise by an arrestee of his or her right to remain silent in the wake of the customary *Miranda* warnings given a suspect at the time of arrest, and might have little or nothing to do with guilt or innocence. Defendant attempted to extend *Doyle* to include the prearrest period.

The Connecticut Supreme Court held that the questions addressed to the defendant by the prosecutor on cross-examination at trial with respect to his prearrest and postarrest silences were not violative of defendant's state and federal constitutional rights to remain silent, in the absence of a demonstration on the record that government personnel induced defendant's postarrest silence by giving him a *Miranda* warning. At the time of his initial questioning, defendant was not under arrest, having turned himself in to the police, and he had not been given *Miranda* warnings when he invoked his Fifth Amendment rights. The court stated that it adheres to the general principle that a "prearrest silence under circumstances where one would naturally be expected to speak may be used either as an admission or for impeachment purposes. . . . The circumstances, of course, must be such that a reply would naturally be called for even in the prearrest setting." Since defendant had never been issued *Miranda* warnings, *Doyle* was inapplicable, and there was no constitutional violation in the cross-examination as to defendant's prearrest and postarrest silences. State v. Leecan, 504 A.2d 480 (1986), 22 CLB 485.

§ 13.35 Chain of possession

Arizona Defendant was indicted for first-degree murder. During the course of their investigation, the police interviewed defendant's girl friend, who told them that the murder victim had a certain wristwatch before his death. Subsequently, an investigator for the county public defender's office contacted defendant's girl friend, who told him that she found a watch in defendant's suit jacket, but that she did not want to give it to the police. The investigator contacted defendant's attorney, who told him to gain possession of the watch and to deliver it to the attorney. The attorney thereafter filed a petition with the Arizona State Bar Ethics Committee requesting an opinion as to his duties in regard to the watch. The Ethics Committee told the attorney that he had an obligation to turn the watch over to the state. The attorney then informed the trial court of the Committee's decision, and the judge ordered that the watch be turned over to the state. That order is the basis of this special action brought by defendant to determine whether his attorney must deliver potentially inculpatory, physical evidence received from defendant's girl friend to the state.

The Arizona Supreme Court, en banc, held that if defendant's attorney believed that the physical evidence was likely to be destroyed, the attorney was required to turn the evidence over to the state prosecutor. The court adopted the standards proposed by the Ethics Committee of the Section on Criminal Justice of the American Bar Association in regard in inculpatory evidence delivered to a defendant's attorney by a third party. The court held that if defendant's attorney reasonably believed that the evidence would not be destroyed, he may return it to the source,

explaining the laws on concealment and destruction; but, if defendant's attorney has reasonable grounds to believe that the physical evidence might be destroyed, or if his client consents, he may turn the evidence over to the state. In the present case, although the defendant did not want the watch turned over to the prosecutor, there was reasonable belief that defendant's girl friend would destroy the watch, so the attorney had to turn it over to the state. Hitch v. Pima County Superior Court, 708 P.2d 72 (1985), 22 CLB 285.

§ 13.45 Character and reputation evidence

Nebraska Defendant was convicted of forcible sexual assault. The victim was a woman whom he knew and with whom he had had sexual relations on five separate occasions, in the presence of and with the participation of the woman's husband. On the night of the sexual assault, though, the woman's husband was not at home. On that night, defendant went to the woman's home, and after gaining entrance to the home, he refused to leave when requested to do so by the woman. Defendant thereupon sexually assaulted the woman, after punching her in the mouth. At a bench trial, defendant moved to admit evidence of the victim's previous sexual relations with defendant, in order to show that the sexual "relations" with the woman on the night of the alleged assault were consensual. The court ruled that defendant's proof was insufficient to establish the relevancy of the victim's past sexual behavior to the act in question. On appeal, defendant argued that the trial court erred in not admitting evidence of the woman's past sexual activity with defendant.

The Nebraska Supreme Court held that evidence of the victim's previous sexual relations with defendant was inadmissible, in the absence of evidence of consent to the sexual act of which defendant was convicted. By Nebraska state law, in order for evidence of a sexual assault victim's past consensual sexual relations with a defendant to be admissible, a defendant must prove that the act for which he was prosecuted was also consensual. In the present case, there was ample evidence, including defendant's own statements, that the sexual act committed by defendant was forcibly performed. When the victim reported the incident, she was bloody and bruised. A neighbor, to whom the victim ran for help, testified that the victim was crying hysterically and bleeding when she sought the neighbor's assistance. An emergency room physician, who treated the victim's wounds, also testified to her physical condition, including the injuries sustained. And, finally, after his arrest, defendant admitted that he "might" have struck the victim, and that it "could be" possible that he had sexual relations with the victim against her will on the night of the incident. Thus, in the absence of either express or inferential consent on the part of the assault victim, the evidence of past sexual relations with defendant was properly excluded from evidence. State v. Hopkins, 377 N.W.2d 110 (1985), 22 CLB 296.

§ 13.115 Identification evidence

Illinois Defendant was indicted for reckless homicide as the result of an automobile accident in which a passenger in the car she was driving was killed. After the accident, defendant was taken to a hospital to have her injuries administered to, at which time a sample of her blood was taken. The sample was taken by a medical technician at the hospital laboratory, which was licensed by the Illinois Department of Public Health to conduct chemical analyses of blood samples for medical purposes. The laboratory and its technicians, however, were not certified under applicable sections of the standards and procedures for testing for alcohol and/or other drugs of the Illinois Vehicle Code. Following her indictment, defendant filed a motion to exclude from evidence the results of the chemical analysis of her blood sample. The trial judge granted defendant's motion and the state appealed.

The Illinois Supreme Court held that the standards and procedures for the testing for alcohol and/or other drugs of the Illinois Department of Public Health, as provided for in the Illinois Vehicle Code, were limited to prosecutions for the offense of driving while under the influence, and were inapplicable in determining the admissibility of blood-alcohol tests in a prosecution for reckless homicide, with

which defendant was charged. The test results should have been received in evidence under the usual standards governing the admission of evidence in such a case. People v. Murphy, 483 N.E.2d 1288 (1985), 22 CLB 282.

§ 13.125 —Testimony of prior identification

New York Defendants were convicted of first-degree robbery. They robbed a man of cash and his house keys. After the robbery, the victim proceeded to a police station to report the incident. He then accompanied two police officers in a patrol car to look for the assailants. About fifteen minutes after they started looking, the victim spotted defendants on the street, and identified them as the assailants. Defendants were thereupon arrested. At trial, the victim testified that defendants had robbed him, but he refused to identify defendants as the perpetrators, because he feared retribution. Even after repeated urging, he refused to look at defendants and identify them as the assailants, claiming that he feared them. At that point, the two arresting officers testified that the victim had positively identified defendants as his assailants, and defendants were subsequently convicted. On appeal, defendants argued that third-party testimony of a witness's prior identification was not admissible to establish identification.

The court of appeals ruled that the police officers' third-party testimony as to the victim's prior identification of defendants was not admissible when the victim refused to make the identification because of fear of retribution. The testimony of third parties recounting a witness's prior identification is in general inadmissible to establish identification. An exception is made when a witness's failure to identify a defendant is due to a lapse of time, a change in defendant's appearance, or the like. In the present case, however, the reason for the witness's failure of identification was fear of retribution, which does not permit the introduction of confirmatory third-party testimony to bolster the evidence of a prior identification. People v. Bayron, 485 N.E.2d 231 (1985), 22 CLB 283.

§ 13.156 Evidence obtained under hypnosis

Virginia Defendant was convicted of murdering and abducting a woman who had been fishing with a male friend when defendant encountered them. Defendant was arrested and charged. About two weeks later, the male friend of the murder victim, whose body had not yet been discovered, underwent hypnosis to remember more details of the events that transpired the day of the abduction. The effort to hypnotize the witness (the male friend), which was made by an anesthesiologist who often used hypnosis in his medical practice, occurred in the presence of the detective investigating the incident, who did not actively participate in the session. Although the witness could see the detective, the detective did not speak to him during the session. The doctor asked the witness to recount the events leading up to the abduction, prompting the witness to give a more detailed account by questioning him during the narrative. The witness recounted the events up to the time when he called the police. Both the witness and the doctor later asserted that the attempt to hypnotize the witness was unsuccessful, that the witness's account of the incident was not altered or enhanced, and that the witness was not influenced by suggestions from the doctor. Later, a woman's body was found near the scene of the abduction, which was identified as that of the victim.

Before his trial, defendant filed a motion to exclude the witness's testimony in its entirely because hypnosis was used to refresh his memory. After reviewing the witness's statements to police prior to his attempted hypnosis, the court found that the witness did not recount anything during the session that he had not already told to the police. The court, therefore, admitted the witness's testimony. After the witness's trial testimony, defendant again moved to strike the testimony on the ground that it was hypnotically tainted, but the trial court denied the motion. Defendant was subsequently convicted. On appeal, defendant argued that the trial court erred in admitting the witness's testimony.

The Virginia Supreme Court held that the witness's testimony was properly admitted at trial. The admissibility of a wit-

ness's testimony depends in part on the witness's competency, and this determination, in general, lies within the discretion of the trial court. The admissibility of hypnotically induced testimony also depends on the competency of the witness, specifically his ability to observe, remember, and communicate facts. In determining the competency of previously hypnotized witnesses, a trial court should review the circumstances surrounding the hypnosis session, including any evidence of suggestion, and should compare the witness's prior statements with those made after a real or alleged hypnotic session. In this case, the record supported the trial court's finding that the witness's testimony after the real or attempted hypnosis was unchanged from that offered before the session. The hypnotist, a doctor who frequently used hypnosis, asserted that no suggestion was offered to the witness to alter or enhance his recollection. The witness's testimony, therefore, was found to be the product of independent recollection, untainted by hypnosis, and was properly admitted. Hopkins v. Commonwealth, 337 S.E.2d 264 (1985), 22 CLB 390.

14. TRIAL

§ 14.121 Dual-jury trial procedure

Idaho Defendant, convicted of premeditated first-degree murder and rape, was sentenced to death. He committed the acts with another man, who was his co-defendant at trial. At the co-defendants' arraignments, the severance of their trials was discussed because of a confession by defendant and inculpatory statements made by his co-defendant. The state made a motion to empanel two juries to hear the case simultaneously, which was ruled on favorably by the trial court. According to the procedure used, separate jury panels heard testimony relating to only one of the co-defendants and decided the guilt or innocence of only one of the co-defendants. Although both juries heard most of the testimony and were at most times present in the courtroom simultaneously, they were sequestered at a hotel in a segregated manner and were required to avoid all contact with members of the other jury panel. In addition, a bailiff was assigned to each jury, and separate opening and closing arguments were presented to each jury.

After his conviction, defendant appealed, asserting that the court's refusal to sever his case from that of his co-defendant and the use of dual juries in a simultaneous trial deprived him of his due process rights.

The Idaho Supreme Court held that defendant received a fair trial and that there was no reversible error. Defendant failed to establish that he was prejudiced merely by the use of the two-jury procedure, and, therefore, the use of such procedure was not improper.

A dual-jury panel was used in this case ostensibly to protect the constitutional rights of each defendant. These rights might have been abridged if two separate trials had been held because at each one defendant might have testified against the other in violation of the prohibition against such testimony. In addition, at the second of the separate trials, the second defendant could presumably suffer the burden of the extensive publicity attracted by the first trial, making a fair and impartial jury panel difficult to obtain. The dual-jury procedure was employed to avoid the problem of the rule in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968), that a defendant's confession may not be used by a jury in deciding the guilt or innocence of a co-defendant.

In this case, defendant argued that the dual-jury procedure should not have been used because of the antagonistic defenses of the co-defendants. The court stated that it saw no problem with this because the co-defendant did not even testify, and the only testimony heard about the acts committed was given by defendant himself. Defendant also argued that he was prejudiced by the admission of testimony of his fiancé, a prosecution witness, who recounted defendant's confession to her, with slight variations in the two versions she gave to the separate juries. Defendant alleged that the juries saw both of the co-defendant's counsels attacking each other's client. Supposedly, this resulted in prejudice to defendant. The court saw no such prejudice or jury confusion. It stated that any contradictions in the state's witness's testimony benefitted defendant. The court saw no problem with the use of a new trial procedure or abuse of the trial

court's discretion in using the dual-jury procedure, even though the trial involved a capital crime and a possible death sentence. The court affirmed defendant's conviction and sentence. State v. Beam, 710 P.2d 526 (1985), 22 CLB 387.

§ 14.150 Conduct of prosecution

§ 14.165 —Comments made during summation

Florida Defendant was convicted of trafficking in methaqualone, possession of a firearm during commission of a felony, and three counts of sale or delivery of cannabis. At trial, the prosecutor had commented during his closing argument that defendant "is supplying the drugs that eventually get to the school yards and eventually get to the school grounds and eventually get into your homes." Defendant argued on appeal that these comments were prejudicial and served as ground for reversal.

The Florida Supreme Court held that the prosecutor's comment that jurors may end up the victims of defendant's criminal behavior if they failed to convict him was improper. The court stated that "no evidence in the record supports a finding that the defendant ever sold any drugs which ended up on a school yard, or in the juror's homes, nor was there any evidence the defendant intended the drugs involved in the instant case to end up in juror's homes." Thus, the prosecutor's argument was highly prejudicial and constituted a basis for reversal. State v. Wheeler, 468 So. 2d 978 (1985), 22 CLB 84.

15. JURY

§ 15.00 Selection of veniremen

§ 15.05 —Qualifications

Missouri Defendant, a prelingually deaf person, was convicted of the capital murder of another prelingually deaf person. Defendant claimed that, by statute, the jury commissioner of the City of St. Louis excluded all persons known to him to be substantially deaf from the jury pool. On appeal, defendant argued that the trial court erred when it excluded from the jury pool deaf, mute, deaf-mute, and blind persons. Defendant argued that the statutory exclusion of this recognizable, handicapped group of persons violated his constitutionally guaranteed right to a trial by a jury composed of a representational cross-section of the community.

The Missouri Supreme Court, en banc, held that the alleged exclusion of handicapped people, specifically deaf persons, from the jury pool did not deny defendant his right to trial by a jury drawn from a cross-section of the community. The cross-section requirement is not absolute. The cross-section requirement is applied less strictly when manifest convenience or the public interest show reason for deviation from the requirement. The exclusion of deaf jurors is made to ensure a fair trial for defendant. It is believed that a jury composed of deaf people might not be able to reach an informed, fair decision. A person who challenges the composition of a jury which is to try him has the burden of establishing the facts necessary to sustain his challenge. In this case, there was no reason to conclude that a deaf person could not expect a fair trial from a jury from which deaf people were excluded. The exclusion of deaf people from a jury, even if established, did not violate defendant's constitutional rights. State v. Spivey, 700 S.W.2d 812 (1985), 22 CLB 298.

§ 15.20 Capital cases

Tennessee Defendant was convicted of first-degree murder and sentenced to death. At trial, several prospective jurors were excused when they expressed reservations in regard to imposition of a death sentence. In particular, one potential juror was dismissed after she expressed reservations about capital punishment and about her ability to impartially decide on defendant's guilt or innocence, knowing that if found guilty he faced a possible death sentence. Specifically, the potential juror said that she would absolutely refuse to consider imposition of the death penalty in this case, regardless of the law and the evidence presented against defendant. On appeal, defendant argued that excusal of the prospective juror because of reservations about the death penalty was improper.

The Tennessee Supreme Court ruled

that excusal of the juror on the basis of reservations in respect to the death penalty was proper. The test of whether a juror may be excused is whether a juror's views would substantially prevent him from fulfilling his duties as a juror in accordance with his instructions and oath. In this case, the court held that the potential juror's views in regard to possible imposition of a death sentence on conviction would impair her performance in respect to a finding of defendant's guilt or innocence. Thus, the excusal of the prospective juror was proper. State v. Williams, 690 S.W.2d 517 (1985), 22 CLB 180.

INSTRUCTIONS

§ 15.155 Lesser included offenses

Arizona Defendant was convicted of felony murder, second-degree burglary, kidnapping, and robbery. Originally, he was indicted for both felony murder and premeditated murder, but the trial court would only instruct the jury on felony murder. Defendant requested that the trial court instruct the jury on lesser included offenses within premeditated murder; specifically manslaughter, second-degree murder, and negligent homicide. The trial court refused to do so, because the premeditated murder charge had been dismissed. On appeal, defendant argued that this refusal on the part of the trial court to instruct the jury on lesser included offenses within the dismissed premeditated murder charge constituted reversible error.

The Arizona Supreme Court disagreed with the appeal grounds, and affirmed the conviction. The court held that "where a charge has been dismissed, a defendant is not entitled to have the jury instructed on the lesser included offenses of that charge." The premeditated murder charge had been dismissed. Without a greater charge, there are no lesser included offenses. The court stated that "requiring the trial court to instruct on lesser included offenses when the greater charge has been dismissed is at odds with the purpose behind the lesser included offense doctrine." The purpose of this doctrine is to offer an alternative other than acquittal or conviction when the jury does not feel that the crime was as charged, but the defendant is clearly guilty of a lesser included offense. In this case, defendant was also charged with felony murder, and was convicted of that charge. He was not entitled to be charged with a lesser offense included within a dismissed charge. State v. Wiley, 698 P.2d 1244 (1985), 22 CLB 80.

§ 15.180 Presumptions and inferences

Utah Defendants were convicted of burglary and theft. When they were arrested, property recently stolen was found in their possession and was used as evidence to convict them. At trial, the jury was instructed as to a statutory presumption that "[a] person commits theft if he obtains or exercises unauthorized control over the property of another with the purpose to deprive him thereof. Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property." On appeal, defendants argued, among other things, that the instructions given to the jury violated their constitutional rights. Specifically, they argued that the jury instructions violated their right to a presumption of innocence and improperly shifted the burden of proving their innocence to defendants.

The Utah Supreme Court held that the jury instructions in question were constitutionally defective. The instructions given the jury that possession of stolen property, in the absence of a satisfactory explanation, was prima facie evidence of theft by the person in possession of the property, improperly shifted the burden of proof from the state to defendants, and were as such an unconstitutional violation of defendants' right to be presumed innocent. The court cited Francis v. Franklin, 105 S. Ct. 1965 (1985), which found that the use of any mandatory rebuttable presumption in a jury instruction is unconstitutional. In this case, the jury instructions set forth a mandatory presumption requiring the jury to find defendants guilty of theft unless defendants rebutted the presumption and persuaded the jury that such a finding was unjustified, in effect, making defendants guilty until proven innocent and shifting the burden of proof from the state to defendants. Accordingly, the court reversed defendants' convictions and remanded the case for a new trial. State v. Chambers, 709 P.2d 321 (1985), 22 CLB 299.

§ 15.225 Charge on issues of law

Georgia Defendant was convicted of murder and sentenced to death. At trial, the prosecutor "read the law" to the court. The prosecutor cited a prior Georgia Supreme Court decision that supposedly established that a presumption of malice may arise from a reckless disregard for human life, and that a wanton and reckless state of mind is sometimes equivalent to a specific intent to kill. The court then advised the jury that they should not take what the prosecutor said to be the law. Although already abolished as a practice in civil cases, it was permissible in Georgia for a lawyer in criminal cases to read to the judge and the jury what the lawyer contends the law to be. The trial judge told the jury that the court would instruct them on the law. After closing arguments by both sides, defendant moved for a mistrial, based on the prosecutor's reading of the law to the jury. Defendant claimed that the law read by the state was no longer valid and should not have been presented to the jury, and that the prosecutor's statements constituted reversible error.

The Georgia Supreme Court held that the prosecutor's statements were not grounds for declaration of a mistrial; however, in the future, reading of the law by either party would be impermissible in criminal cases as well as in civil cases. The trial court in this case advised the jury that what the prosecutor said was the law should not be accepted by them as such, and that the court would instruct them on the law. Nonetheless, the evidence presented in this case as to defendant's state of mind "overwhelmingly establishes intent to kill, which is the only element of malice implicated by the quote. . . ." Moreover, the court decided that from then on, reading of the law would no longer be permissible in criminal cases or in civil cases. The court stated that while it is acceptable for counsel to refer to applicable law, it is unacceptable for an attorney to cite laws that the court did not charge. Conklin v. State, 331 S.E.2d 532 (1985), 22 CLB 80.

DELIBERATION

§ 15.275 Other unauthorized or improper conduct

Kansas Defendant was convicted of first-degree murder and aggravated battery of a law enforcement officer. One day after the initial jury was instructed and began deliberating, one of the jurors delivered a short note to the court requesting that she be excused. The presiding judge discussed the situation with counsel for the state and defendant, both of whom urged that the juror be examined to determine why she wanted to be excused. The court felt that a hearing was unnecessary, since there was no issue of jury misconduct involved. The judge excused the juror for incapacity, based on her note and voir dire statements to similar effect (i.e., that she was not up to the stress caused by the case and her duties as a juror). One of the alternate jurors was chosen to replace the discharged juror. The judge then instructed the jury to commence deliberations anew. The alternate juror, who had been sequestered during the initial deliberations, was not examined to find out if he had been influenced in any way during this period. On appeal, defendant argued that it was reversible error for the original juror to be excused without a hearing for cause, thereby denying defendant the right to have his guilt or innocence decided by the jury that he had selected. Specifically, defendant argued that the replacement of the original juror denied him the right to have a mistrial declared in the event of a hung jury. In addition, defendant alleged that the trial court erred by not questioning the replacement juror as to whether he had been tainted during his sequestration period after the close of the evidence stage of the trial.

The Kansas Supreme Court affirmed the conviction. The trial judge had not abused his discretion by not holding a formal hearing to determine the reasons why the original juror should be excused. A hearing for cause as to impartiality or prejudice when a jury is impaneled is a different matter than the discharge of a juror for incapacity. In this case, the judged acted permissibly in finding reasonable cause for excusing the juror. Also, it was not reversible error for the trial court to substitute a juror without asking him whether he had been unduly influenced during his absence from initial deliberations. Defendant had not been prejudiced by the substitution of jurors, because the alternate had never been discharged and, after replacement,

the court ordered the jury to begin deliberations anew, thereby ensuring defendant his right to a verdict decided by the jury that ultimately returned the verdict. It is permissible for a juror to be discharged after the commencement of deliberations, and there is no requirement that the original jury panel deliver the verdict, even if substitution of jurors means a possible change in the eventual verdict. As to the question of the impartiality of the alternate juror, defendant did not object to the court's failure to examine him at trial, and defendant thus waived his right to appeal this issue. State v. Haislip, 701 P.2d 909 (1985), 22 CLB 79.

VERDICT

§ 15.320 Requirement of unanimity

Alaska Defendant was convicted of first-degree assault for the stabbing of another man with a knife. At trial, the jury was instructed that it could find defendant guilty if (1) he caused physical injury to a person by means of a dangerous instrument, with an intent to cause serious injury or (2) he intentionally performed an act that resulted in serious physical injury to another person, under circumstances manifesting extreme indifference to the value of human life. The jury was not required to reach unanimity as to exactly which statutory subsection defendant violated, only that he was guilty of the general offense of first-degree assault. The jury returned such a verdict. On appeal, defendant argued that the jury should have had to be unanimous as to its interpretation of the statute and exactly which subsection he violated. Consequently, his due process rights had been violated because proof beyond a reasonable doubt was not assured on each element of the offense charged in the particular subsection.

The Alaska Supreme Court held that the jury did not have to agree unanimously as to a particular theory of the statutory crime charged, only as to whether defendant committed the single offense described in the statute, as determined by the evidence. If there is sufficient evidence in the record that defendant committed the crime charged, according to either or both definitions of the crime, the jury may convict him of that crime, without deciding unanimously as to exactly which subsection of the statute he violated. State v. James, 698 P.2d 1161 (1985), 22 CLB 168.

17. SENTENCING AND PUNISHMENT

SENTENCING

§ 17.40 Standards for imposing sentence

Georgia Defendant was convicted of trafficking in cocaine. Two co-defendants were also tried with defendant, and another accomplice, who escaped from custody, was tried in absentia. Before trial, in accordance with a Georgia state statute, the district attorney offered defendant a reduced sentence if he agreed to provide information about his accomplices. In response, defendant unsuccessfully moved to dismiss the charge against him on the ground that the state had violated his Fifth Amendment right not to be compelled to be a witness against himself. On appeal, defendant argued that the relevant section of the Criminal Code places a person convicted of trafficking in cocaine in a dilemma: either remain silent and receive a harsher, mandatory sentence or provide information about accomplices or other persons, which information might have the effect of implicating the convicted person in other crimes with no promise of immunity, in return for a more lenient, reduced sentence on the original conviction. In addition, defendant argued that the statute was unconstitutionally vague.

The Georgia Supreme Court held that the statute providing that the district attorney could recommend that the trial court reduce defendant's sentence for the cocaine trafficking conviction if he provided substantial assistance to authorities in trying his accomplices did not violate defendant's Fifth Amendment right not to be compelled to be a witness against himself, and was not so vague as to violate his constitutional right to due process. The relevant statute, the court pointed out, provides that if a convicted cocaine trafficker provides "substantial assistance in the identification, arrest or conviction of any of his *accomplices, accessories, co-conspirators or principals,*" the district attorney could recommend that the trial court reduce his sentence. The court went on to state that "In clear language . . . the statute contemplates only that the convicted trafficker will provide information about *others involved in the crime for*

which he has been convicted." The statute, then, only applies to the crime of which defendant was convicted, and does not involve implication in any other crimes. In this case, defendant argued before trial that he was asked to exchange his Fifth Amendment right not to incriminate himself for the possibility of a reduced sentence upon conviction. The statute in question, though, did not leave defendant open to prosecution on any other charges than those brought against him already, and was not, therefore, unconstitutional on its face. In addition, the court opined, the term "substantial assistance" was not too vague for persons of ordinary intelligence to understand, and was not, therefore, violative of due process. Brugman v. State, 339 S.E.2d 244 (1986), 22 CLB 488.

Nebraska Defendant was convicted of two counts of unlawful delivery of a controlled substance. He was sentenced to concurrent prison terms of one to two years on count I, delivery of marijuana, and one and one half to three years on count II, delivery of cocaine. There was a co-defendant in the case who was charged with identical offenses arising out of the same incident. The co-defendant made a plea bargain before a different judge than defendant's, by which he pled guilty to the cocaine charge and had the marijuana charge dismissed. One week after defendant's sentencing, the co-defendant was sentenced by another judge to a two-year probation term. On appeal, defendant argued that the trial court in his case abused its discretion in sentencing him to a different, more severe punishment than the co-defendant.

The Nebraska Supreme Court upheld defendant's sentence. The trial court did not abuse its discretion, and absent such abuse, a sentence within statutory limits will not be overturned on appeal. Likewise, the imposition of a probationary term rather than a prison term, if statutorily permitted, is within a sentencing judge's discretion. Furthermore, defendant was not entitled to relief on the basis of the sentencing disparity. The Nebraska Supreme Court held that, if one disregards the co-defendant's sentence, defendant's sentence was not excessive. While defendant's sentence was appropriate under the circumstances of the case, the co-defendant's sentence was in fact extremely lenient. The court stated that if there was an improper sentence that should be appealed, it was not defendant's but rather the co-defendant's inappropriate sentence. The county attorney should have appealed the latter sentence. In any case, defendant was not entitled to relief simply because a co-defendant received a different, more lenient punishment: "Where it is apparent that the lesser sentence imposed upon a co-defendant is erroneous, the sentencing court is not required to reduce all more severe though properly imposed sentences just to obtain uniformity." State v. Morrow, 369 N.W.2d 89 (1985), 22 CLB 180.

§ 17.67 Reduction of sentence

California Defendant pleaded nolo contendere to charges of robbery, false imprisonment, assault with a deadly weapon, and assault with a deadly weapon upon a peace officer, and he admitted to allegations relating to three weapon-use enhancements. Defendant also admitted to a prior felony conviction for which he served a separate prison term and another prior "serious felony" conviction of robbery. He was sentenced for the present convictions to fifteen years in prison, including a consecutive term of five years for the prior serious felony conviction. The record of the sentencing hearing indicates that the trial court believed that the imposition of a consecutive five-year sentence for the serious felony enhancement was statutorily mandated. On appeal, defendant argued that the trial court erred in concluding that it had no discretion to strike the prior, serious felony conviction for purposes of sentencing.

The California Supreme Court held that the trial court retained the discretion to strike the prior conviction and forego the additional five-year enhancement sentence in the "interest of justice." The court stated that neither applicable sections of the California Penal Code nor applicable articles of the California Constitution abrogated a trial court's traditional authority to strike a prior conviction. Because the trial court erred in deciding that it had no discretion to strike the prior felony conviction, the California Supreme Court vacated defendant's sentence and remanded the case to the trial court with directions to

resentence defendant in light of the conclusion reached by the California Supreme Court. People v. Fritz, 707 P.2d 833 (1985), 22 CLB 394.

PUNISHMENT

§ 17.86 Habitual criminal status

Washington Defendant was convicted of first-degree burglary, first-degree theft, and second-degree assault, all while armed with a deadly weapon and firearm. He was then found to be a habitual criminal, based on three valid felony convictions. Defendant argued that the state had not proved beyond a reasonable doubt a 1981 conviction based on a not guilty plea at a bench trial on stipulated facts. Defendant appealed the present finding that he was a habitual criminal. He argued that the prior felony conviction was not valid proof, because the state could not show that he had knowingly and voluntarily waived his constitutional rights, specifically the right to confront his accusers. The state argued that in a stipulated facts trial, a defendant does not have to be advised of his constitutional rights.

The Washington Supreme Court held that in habitual criminal proceedings, the state is not required to show that a defendant voluntarily and knowingly waived his constitutional rights before stipulating to facts upon which a defendant was found guilty at a bench trial in a prior case. The court stated that the basic issues that had to be decided were whether a stipulated facts trial is tantamount to a guilty plea and if a defendant in such a case has to be advised of his constitutional rights. The court found that a stipulated facts trial is not the same as a guilty plea; but, in this case, defendant executed a written waiver of his right to a jury trial, and his 1981 conviction could therefore be used to establish defendant's status as a habitual criminal. State v. Johnson, 705 P.2d 773 (1985), 22 CLB 286.

§ 17.90 Credit for time spent in custody prior to sentencing

Connecticut A proceeding for habeas corpus relief was instituted by a man charged in Connecticut with six counts of first-degree robbery. After his initial arrest, while he was incarcerated awaiting arraignment, the alleged robber escaped from custody and fled to Florida. He was rearrested in Florida and charged with being a fugitive from justice. He decided to resist extradition, but when his petition contesting the validity of the extradition was denied, he was returned to Connecticut. On his conviction and sentencing on the escape charge, the robber was committed to the custody of the commissioner of corrections. The commissioner credited the robber with time spent awaiting sentencing, but refused to credit him with the time spent in custody fighting extradition to Connecticut. The robber appealed, charging that he was subjected to a prolonged sentence, in violation of equal protection and due process guaranteed by the Fourteenth Amendment, because he was not credited with the time spent in confinement in Florida fighting extradition to Connecticut.

The Connecticut Supreme Court ruled that the robber was not subjected to an illegal confinement, because he was not under Connecticut jurisdiction during the time he was confined in Florida resisting extradition to Connecticut. A Connecticut statute regarding presentence confinement credit for time served in a community correctional center authorizes credit for time served awaiting trial, but not awaiting extradition. The court stated that "the petitioner [robber] has pointed to nothing that demonstrates that the legislature intended to extend to fugitives from Connecticut justice awaiting extradition the credit he now seeks." The court went on to state in this regard that "the petitioner's claim that he was held in Florida on a Connecticut charge and was held under color of Connecticut law and is therefore entitled to equal protection under Connecticut law must fail." The robber had also charged a violation of his due process rights under the federal and state constitutions. In this regard, the court held that "the record contains no hard evidence of any vindictiveness, retaliation or punishment directed to the respondent [commissioner] in refusing the requested credit. . . . Certainly, it is anomalous to argue that the commissioner is violating due process because he has performed his obligation under the statute." Given the commissioner's statutory duty, and lacking clear evidence that punishment for resisting ex-

tradition was the commissioner's motive, the robber was not denied his due process rights. Johnson v. Manson, 493 A.2d 846 (1985), 22 CLB 81.

§ 17.140 Multiple sentences—right to attack prior conviction

§ 17.150 —What constitutes a prior felony conviction

Colorado Defendant was convicted of the crime of "possession of weapons by a previous offender." The present conviction arose out of a traffic accident in which defendant was involved. When police officers arrived at the scene of the accident, they found defendant with a handgun on his person, another gun and ammunition in his car, and two other guns near the accident scene, which were allegedly abandoned by passengers in defendant's car. Defendant was arrested and eventually charged with violating Colorado's "felon with a gun" statute, which prohibits previously convicted felons from possessing weapons.

Before his trial, defendant filed a motion to dismiss the charge on the ground that the prior felony conviction on which the present offense was based—a guilty plea to the crime of second-degree burglary—was invalid because it was obtained in violation of his constitutional right to be informed of the elements of the crime to which he pleaded guilty. The trial court ruled that the plea was invalid and could not, therefore, be used to impeach defendant's credibility should he choose to testify. Nonetheless, the court denied defendant's motion to dismiss the charge, holding that an invalid plea of guilty can still form the basis for a conviction. Defendant was subsequently found guilty by a jury of the present charge. On appeal, defendant argued that the trial court erred in denying his motion to dismiss the charge once it found that the underlying conviction was obtained in violation of his constitutional rights.

The Colorado Supreme Court, en banc, held that an earlier conviction based on an invalid guilty plea could not serve as the predicate felony for the violation of the statutory prohibition against the possession of weapons by a previous offender. An unconstitutionally obtained conviction cannot be used in a later criminal prosecution to establish guilt or to enhance punishment. A valid, underlying conviction is required if the purpose of the felon-with-a-gun statute is to be realized. Accordingly, the Colorado Supreme Court reversed defendant's conviction and remanded the case to the trial court with instructions to dismiss the charge against defendant. People v. Quintana, 707 P.2d 355 (1985), 22 CLB 392.

§ 17.165 —Consecutive sentences

North Carolina Defendant was convicted of first-degree burglary and felonious larceny, after being convicted of voluntary manslaughter in an earlier trial. At the time of the first trial, there had been insufficient evidence to charge defendant with burglary. All the convictions arose out of one incident, in which defendant shot a woman to death and took her purse. Defendant was sentenced to a prison term of fourteen years for the burglary, to run consecutively with a six-year sentence imposed for the manslaughter conviction imposed in the previous trial. He was sentenced to three years for the larceny conviction, to run concurrent with the term imposed for the burglary. At trial, the judge said that he imposed this consecutive sentence because he was mandated to do so by state statute. He stated that he would otherwise have ordered that the burglary sentence run concurrent with that of the manslaughter sentence. On appeal, defendant argued that the trial court's interpretation of the statute was erroneous, and that the only time a judge must impose a burglary sentence consecutively with another sentence is when the other sentence was also imposed for burglary. In this case, of course, the other sentence in question was imposed for voluntary manslaughter. Thus, defendant argued, the sentence imposed on him for the burglary conviction should run concurrent with the manslaughter sentence, not consecutively with it.

The North Carolina Supreme Court affirmed the consecutive sentence. According to the court, "the plain meaning of [the statute] is that a term imposed for burglary under the statute is to run consecutively with *any other sentence* being served by the defendant." The trial court was, therefore, correct in imposing a sen-

tence on the burglary conviction to run consecutively with that of the previous manslaughter conviction. State v. Warren, 328 S.E.2d 256 (1985), 22 CLB 88.

20. PRISONER PROCEEDINGS

§ 20.00 In-prison proceedings

New York Inmates at Attica Correctional Facility filed petitions for writ of habeas corpus after they were subjected to disciplinary hearings and actions. The disciplinary actions were taken after correction officers signed misbehavior reports, which were used as evidence at the hearings. The six inmates charged that the misbehavior reports did not constitute substantial evidence and that the imposition of disciplinary actions on the basis of those reports violated their due process rights. Specifically, the inmates claimed that the disciplinary determinations could not stand because under New York State law, misbehavior reports do not constitute sufficient evidence for an administrative determination and because the due process clause of the U.S. Constitution requires a factfinder to hear testimony.

The New York Court of Appeals held that the misbehavior reports signed by the correction officers formed a sufficient basis for disciplinary actions and that the imposition of those actions on the inmates based on such reports met due process rights requirements. The court ruled that the written reports were sufficiently relevant and probative to constitute substantial evidence supporting the determinations that the inmates violated the institutional rules of the Attica Correctional Facility. Each report specifically described an incident that the officer who signed it claimed to have witnessed and specifically described which rules each incident violated. In addition, each report was dated the same day as the incident and was endorsed or initialed by one or more other correction officers. The inmates were offered assistance in preparing for the disciplinary hearings; no witnesses were requested in advance; the inmates were advised of their rights; and the inmates offered little more than denials of the charges. Regarding the question of whether the federal Constitution requires that a factfinder hear testimony, the court ruled that due process of the law does not require that disciplinary board members interview correction officers who write misbehavior reports leading to the imposition of disciplinary actions. People *ex rel.* Vega v. Smith, 485 N.E.2d 997 (1985), 22 CLB 392.

21. ANCILLARY PROCEEDINGS

CONTEMPT

§ 21.00 Contempt—civil and criminal contempt distinguished

§ 21.15 —Right to jury trial

Oregon Defendant was found guilty of contempt of court for violating a restraining order issued under the Oregon State Abuse Prevention Act, which prevents molesting, bothering, or interfering with a woman in Oregon. The woman complained that defendant had broken into her house, assaulted her, and subjected her to other abusive acts. Defendant moved for a jury trial, which was denied by the trial court. The trial court found the proceeding to be of civil, not criminal, contempt, making defendant ineligible for a jury trial. Subsequently, defendant was found guilty of four counts of contempt, two beyond a reasonable doubt and two by a preponderance of the evidence. Defendant was sentenced to thirty days in jail on one count, and the court postponed sentencing on the other three counts pending a presentencing investigation.

The trial court subsequently suspended the sentence of imprisonment and placed defendant on one-year probation for the other three counts, to run concurrently. On appeal, defendant argued that the trial court erred in ruling that the contempt proceeding was of civil rather than criminal contempt and that he was not entitled to a jury trial on state statutory and constitutional grounds. Specifically, he asserted that because the infraction with which he was charged called for a six-month period of imprisonment or a $300 fine, it was by definition an offense entitling him to a jury trial, according to Oregon state law. In addition, defendant argued that he was entitled to a jury trial on constitutional grounds because the acts he committed in violation of the restraining order were traditional criminal acts, namely, burglary and assault.

The Oregon Supreme Court, en banc,

held that the contempt proceedings were criminal and not civil in nature; but, nonetheless, defendant was not entitled to a jury trial. Although criminal contempt is by definition an offense, not all offenses under Oregon law provide for imprisonment or entitle a defendant to a jury trial. Under Oregon law, an offense may be a violation if it is statutorily designated to be so or if the offense is punishable only by a fine, forfeiture, suspension, or other civil penalty. Likewise, an offense is an infraction if it is statutorily designated to be so and if the offense is punishable only by a fine, forfeiture, suspension, or other civil penalty. Oregon law specifically states that a trial of any infraction shall be by a court without a jury. Defendant, charged with an infraction of the Abuse Prevention Act, was not entitled to a jury trial merely because the act provides for imprisonment as a sanction against its violation.

As for defendant's constitutional argument, the court ruled that the proceeding in this case was exceptional as it pertained to Article I of the Oregon Constitution's provision for a jury trial for criminal acts. The court stated that "the essence of criminal contempt is the violation of the court's order, not the nature of the act that violated the order." The court saw no valid distinction between criminal contempt proceedings based on whether the order was violated by a criminal or a noncriminal act. Defendant violated a restraining order entered pursuant to the Abuse Prevention Act, and he was found guilty of contempt of such order, not of assault and burglary. Thus, defendant was not entitled to a jury trial. State *ex rel.* Hathaway v. Hart, 708 P.2d 1137 (1985), 22 CLB 389.

Kansas Defendant was convicted of conspiracy to commit felony-theft and felony-theft. Defendant, who was seventeen years old, was initially charged as a juvenile offender. The state subsequently filed a motion for a waiver of the court's jurisdiction, under the Kansas juvenile offenders code, and sought to try defendant as an adult. The court appointed counsel for defendant and set a hearing date. After two continuances requested by counsel were granted, a hearing date was rescheduled. On that date, counsel appeared, but neither defendant nor her parents did so. Counsel stated that defendant was not present because she had mistakenly been arrested that morning on a warrant issued for her sister. Despite defendant's absence, the court allowed the hearing to proceed, without any objection from counsel, who cross-examined the state's witnesses but declined to testify on defendant's behalf. The court found that defendant should not be considered a juvenile, and waived its jurisdiction. The juvenile complaint was dismissed, and criminal charges were filed against defendant. On appeal, defendant argued that her due process rights were violated because she was not present when the hearing was held.

The Kansas Supreme Court affirmed defendant's conviction. The court held that since defendant was represented by counsel, her due process right was not denied, although she was involuntarily absent from the hearing. The court ruled that when the statutory provisions requiring a hearing, notice of same, and the right of the juvenile to be present at such hearing are met, along with the requirement of counsel, due process has been satisfied, even though the juvenile "fails" to appear. State v. Muhammad, 703 P.2d 835 (1985), 22 CLB 175.

JUVENILE PROCEEDINGS

§ 21.55 Juvenile proceedings—sufficiency of charge

§ 21.65 —Right to due process

Arizona Defendant, a 13-year-old, was arrested for sexual abuse and sexual conduct with a 15-year-old girl. The defendant had a mental age of 9 or 10 years. A state statute provides that where a person is less than 14 years of age at the time of the criminal conduct charged, the state must submit "clear proof that at the time of committing the conduct charged the person knew it was wrong." Defendant was charged with delinquency by a petition filed in juvenile court for his alleged act in the sexual abuse and sexual conduct incident. During trial review, defendant denied the allegations of the petition and, through counsel, requested a hearing to determine his legal capacity to understand the wrongfulness of his conduct pursuant to the state statute. The state opposed the request for a hearing on the grounds that the statutory section is inapplicable to delinquency proceedings. On appeal, the

issue presented was whether the statutory provisions in the Criminal Code are applicable to delinquency proceedings in juvenile court.

The majority of the Arizona Supreme Court, en banc, held that the legislature did not intend for the Criminal Code provision creating a presumption of incapacity for children under 14 years of age to apply to juvenile proceedings because the provisions for disposition of juvenile offenders have always been separate from the Criminal Code. Therefore, the court concluded that the presumption of incapacity on children under 14 years of age is not a due process safeguard for all children accused of criminal behavior whether charged in an adult criminal proceeding or in juvenile court. Gammons v. Berlat, 696 P.2d 700 (1985), 22 CLB 294.

PART III—FEDERAL CRIMES

22. VALIDITY OF CRIMINAL STATUTES

§ 22.10 Statute held void for vagueness

Court of Appeals, 1st Cir. After defendant was convicted in the district court of violating the Currency Transaction Reporting Act and related offenses, he appealed on the ground that he had not been properly forewarned of the criminal consequences of his acts.

The Court of Appeals for the First Circuit reversed, holding that the Currency Transaction Reporting Act (31 U.S.C. § 5311) imposed no duty on the defendant to inform the bank of the structured nature of the transactions in which he purchased three checks from one bank in one day, none of which exceeded $10,000 individually. The court explained that the Constitution requires that, before any person is held responsible under the criminal laws, the conduct prohibited must be outlined with sufficient specificity to forewarn of the proscription of such conduct, especially where the confusion and uncertainty in the law has been caused by the government itself. United States v. Anzalone, 766 F.2d 676 (1985), 22 CLB 74.

23. CONSTRUCTION AND OPERATION OF CRIMINAL STATUTES

§ 23.00 Legislative intention as controlling

U.S. Supreme Court After defendant was convicted in the district court of unlawfully attempting to destroy by fire a building used in interstate commerce, he appealed on the ground that the subject two-unit apartment building being rented at the time of the fire was not "in" interstate commerce. The court of appeals affirmed.

The Supreme Court affirmed, holding that the subject building destroyed in the fire was being used in an activity affecting commerce. The Court reasoned that the legislative history indicated that Congress intended to protect all "business property," and the rental of real estate is unquestionably an activity that affects commerce for purposes of the statute. Russell v. United States, 105 S. Ct. 2455 (1985), 22 CLB 72.

24. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 24.15 Bank-related crimes generally

Court of Appeals, 4th Cir. After the defendant was convicted in the district court of making materially false statements on a loan application to a federally insured bank, he appealed on the grounds, among other things, that the bank would have made the loan to him regardless of the misrepresentation.

The Court of Appeals for the Fourth Circuit affirmed the conviction, holding that the fact that the manager of the bank was making the loan to the defendant to improve the branch's accounting status rather than because of the defendant's misrepresentation did not preclude conviction of the defendant for making materially false statements on a loan application. The court reasoned that the elements of the offence were met as long as the misrepresentations had the capacity to mislead the bank. United States v. Whaley, 786 F.2d 1229 (1986), 22 CLB 478.

§ 24.45 Conspiracy

Court of Appeals, 2d Cir. After the defendants were convicted in the district court of conspiracy to retaliate against a witness, they appealed on the ground that the evidence of a conspiracy was insufficient.

The Court of Appeals for the Second Circuit affirmed in part and reversed in part, holding that the convictions for conspiracy to retaliate against a witness must be reversed, since there was no showing of any formal or express agreement to retaliate against the witness. One of the defendants simply passed along a message to "take care of" a witness, which is not enough to show that there was a tacit understanding that they would deal harshly with "squealers." United States v. Wardy, 777 F.2d 101 (1985), 22 CLB 278.

Court of Appeals, 5th Cir. After defendants were convicted in the district court of committing various crimes as part of an ongoing RICO criminal enterprise, they appealed on the ground, among others, that there was a fatal variance between the indictment, which charged one conspiracy, and the evidence at trial, which showed a group of unrelated conspiracies.

The Court of Appeals for the Fifth Circuit affirmed, holding that a group of defendants could be tried together for violating RICO even though multiple conspiracies existed. The court explained that under the RICO enterprise concept, agreement among all conspirators is no longer necessary as long as each defendant had some knowledge of the enterprise's nature. United States v. Manzella, 782 F.2d 533 (1986), 22 CLB 385.

§ 24.90 False statement to federal department or agency

Court of Appeals, D.C. Cir. After his conviction in the district court for making false statements in matters within the jurisdiction of a department or agency of the United States (18 U.S.C. § 1001), defendant, a former congressman, appealed on the ground, among other things, that his failure to disclose a bank loan to his wife on his financial disclosure report required by congressmen under the Ethics in Government Act was not a "material" misstatement under the statute.

The Court of Appeals for the District of Columbia affirmed the conviction, holding that the failure of the congressman to disclose a bank loan to his wife co-signed by a third party constituted a willful violation of the statute, since it tended to conceal information that would have prompted an investigation. The court explained that the use of credit of a third person, which the cosignature of the third party conferred, constituted a gift to the congressman's spouse that should have been reported on the annual disclosure report. United States v. Hansen, 772 F.2d 940 (1985), 22 CLB 162.

§ 24.145 Income tax evasion

Court of Appeals, 6th Cir. After defendant was convicted in the district court of income tax evasion, he appealed on the ground that the evidence offered at trial was insufficient to support the conviction.

The Court of Appeals for the Sixth Circuit affirmed the conviction, holding that the evidence that the defendant failed to declare as income checks made out to a corporation and deposited in his personal checking account was sufficient to support the conviction. The court reasoned that since the proceeds from the checks were in the defendant's possession and he was in a position to dispose of the money at will, the proceeds should have been reported by him in his gross income. United States v. Curtis, 782 F.2d 593 (1986), 22 CLB 385.

§ 24.160 Interstate racketeering

Court of Appeals, 2d Cir. After individual and corporate defendants were convicted in the district court of mail fraud and RICO violations, they appealed on the ground, among other things, that the RICO forfeiture amount had been improperly calculated.

The Court of Appeals for the Second Circuit affirmed, holding that gross rather than net profits should be used to determine the amount to be forfeited under RICO. The court noted that the Supreme Court, in *Russello,* had left open the issue of how the term "profits" in the RICO forfeiture statute should be interpreted. In so holding, the court observed that punishment best fits the crime when forfeiture is keyed to the magnitude of a defendant's

criminal enterprise, and that calculation of forfeiture based on gross profits from illegal activity does not destroy this "rough proportionality." United States v. Lizza Industries, 775 F.2d 492 (1985), 22 CLB 280.

Court of Appeals, 6th Cir. The defendants were convicted in the district court on RICO charges stemming from evidence that the defendants made improper kickbacks in exchange for judicial favors from Michigan state judges.

On appeal, the Court of Appeals for the Sixth Circuit affirmed the convictions, holding that there is no requirement under RICO that all conspirators be involved in each of the underlying acts of racketeering, or that the predicate acts be interrelated in any way. The court noted that all that is required is that the acts be connected to the affairs of the enterprise, which in this case was conducted through a pattern of racketeering activity consisting of bribery, mail fraud, and obstruction of a criminal investigation. United States v. Qaoud, 777 F.2d 1105 (1985), 22 CLB 279.

Court of Appeals, 7th Cir. After defendant was convicted of twenty counts under RICO (18 U.S.C. §§ 1961 et seq.), he was sentenced to five years' probation, ordered to make restitution of $150,000, and further ordered to forfeit one-half interest in his firm's legal fees, or $225,000. The government presented no evidence at trial that defendant possessed or controlled the money he received in legal fees at the time of his conviction.

The Court of Appeals for the Seventh Circuit affirmed the judgment of the district court, holding that the government need not prove beyond a reasonable doubt the existence, at the time of conviction, of any interest the defendant acquired in violation of RICO before obtaining forfeiture of such interest. The court reasoned that since RICO forfeiture is a sanction against the individual defendant rather than a judgment against the property itself, the government need not trace it even though forfeiture is not due until after conviction. United States v. Ginsburg, 773 F.2d 798 (1985), 22 CLB 159.

Court of Appeals, 7th Cir. After defendant was convicted in the district court for violating the RICO statute and Hobbs Act, he appealed on the ground that he had been improperly charged under RICO. The predicate RICO acts he was charged with included four actual or attempted armed robberies, two thefts, and an attempted murder. In essence, the defendant was indicted and tried under RICO on the theory that he had conducted his own affairs through a pattern of racketeering activity.

The Court of Appeals for the Seventh Circuit reversed on the RICO conviction, holding that a defendant cannot be convicted under RICO as both the "person" and the "enterprise" that had its affairs conducted through a pattern of racketeering activity. The court reasoned that, to find otherwise, the RICO section would lead to the anomalous result that the entity could be employed by or associated with itself. United States v. DiCaro, 772 F.2d 1314 (1985), 22 CLB 163.

§ 24.215 Obstruction of justice

Court of Appeals, 2d Cir. Defendants were indicted and convicted for having conspired to obtain a mistrial in a loansharking case. On appeal, they argued that the government should have been required to prove that they knew that the proceeding they were charged with having obstructed was federal in nature.

The Court of Appeals for the Second Circuit affirmed, holding that there is no requirement under the obstruction-of-justice statute to prove that defendants knew that the proceeding was a federal one. The court noted that while it is essential for the proceeding being obstructed to be a federal one, it is unnecessary that the defendants know that it is. United States v. Ardito, 782 F.2d 358 (1986), 22 CLB 384.

§ 24.220 Perjury

§ 24.225 —Grand jury testimony

Court of Appeals, 2d Cir. After defendant was convicted of knowingly making a materially false declaration while testifying under oath before a grand jury, he appealed on the ground that his testimony was not false.

The Court of Appeals for the Second Circuit reversed, holding that the answers to fundamentally ambiguous questions

about bank checks should not have been submitted to the jury, and that answers that were literally true could not form the basis for a perjury conviction. United States v. Lighte, 782 F.2d 367 (1986), 22 CLB 384.

§ 24.265 Wire fraud

Court of Apeals, 7th Cir. After defendant was convicted in the district court for wire fraud and possession of electronic eavesdropping equipment, he appealed on the ground that the evidence against him was insufficient. The evidence indicated that defendant, posing as a representative of the Illinois "Special Investigations Unit," had placed an order with a private firm for an electronic stethoscope and other illegal eavesdropping equipment.

The Court of Appeals for the Seventh Circuit affirmed the conviction, holding that defendant's intent to defraud the company could be inferred from the fact that the company never received payment for the shipped merchandise delivered to defendant. The court also found that defendant's misrepresentation of his identity went to "the heart of the bargain" (i.e., the purchaser's creditworthiness) because the order would probably not have been accepted if defendant had made it in his individual capacity. United States v. Pritchard, 773 F.2d 873 (1985), 22 CLB 168.

25. CAPACITY

§ 25.10 Insanity

§ 25.15 —Burden of proof

Court of appeals, 6th Cir. After defendant was convicted in Tennessee state court on rape and kidnapping charges, he appealed on the ground that the prosecution failed to present sufficient evidence of his sanity at the time the crimes were committed.

The district court denied relief, but the Court of Appeals for the Sixth Circuit vacated and remanded, holding that a rational trier of the facts could not have found beyond a reasonable doubt that defendant was sane at the time the acts were committed. The court noted that the prosecution had a duty to prove sanity as an element of the crime, a burden that it failed to meet in view of the victim's own testimony as to defendant's bizarre conduct while she was abducted, including the fact that defendant seemed to be talking to a third person who was not there. Defendant had also been previously institutionalized for five years following a prior rape, and he testified that a "voice" directed him to commit the rape. Duffy v. Foltz, 772 F.2d 1271 (1985), 22 CLB 163.

§ 25.20 —Expert testimony

Court of Appeals, 4th Cir. After defendant was convicted in the district court of interstate transportation of a stolen motor vehicle and related charges, he appealed on the ground that the trial court had improperly excluded evidence of his pathological gambling.

The Court of Appeals for the Fourth Circuit affirmed the conviction, holding that where the expert testimony did not establish any causal connection between defendant's alleged pathological gambling disorder and the charged offenses, the testimony about pathological gambling was properly excluded for lack of foundational relevance to defendant's insanity defense. United States v. Gillis, 773 F.2d 549 (1985), 22 CLB 164.

Court of Appeals, 7th Cir. After defendant was convicted in the district court of a scheme to defraud in which he forged government checks, he appealed on the ground that the trial judge had improperly excluded evidence relating to his insanity defense.

The Court of Appeals for the Seventh Circuit affirmed, holding that expert testimony of his compulsive gambling was properly excluded, since the testimony would not have assisted the jury to determine the controlling issue, which was why a compulsion to gamble would translate into an uncontrollable impulse to obtain money illegally. The court also found that any probative value of the evidence would have been outweighed by the danger of misleading or confusing the jury. United States v. Davis, 772 F.2d 1339 (1985), 22 CLB 164.

27. DEFENSES

§ 27.00 Alibi

Court of Appeals, 6th Cir. After defendant was convicted in a Virginia state court for

armed assault and malicious shooting and wounding, he sought habeas corpus in federal court on the grounds that the evidence introduced against him was legally insufficient. The district court denied the petition.

On appeal, the Court of Appeals for the Sixth Circuit affirmed, holding that defendant's false alibi that he had never been with his two co-defendants on the evening of the crime could be used by the jury to infer guilt. The court noted that the concealment of the truth, along with the evidence that defendant left the house with his co-defendants prior to the commission of the crime, raised a rational inference that defendant was with the co-defendants when the crime was committed. Bronston v. Rees, 773 F.2d 742 (1985), 22 CLB 167.

PART IV—FEDERAL PROCEDURES

28. JURISDICTION AND VENUE

§ 28.15 Venue

Court of Appeals, 2d Cir. Defendant was indicted in the Southern District of New York on perjury and obstruction of justice charges relating to statements made during his deposition in San Francisco in a pending civil case filed in the Southern District. The district court judge dismissed the charges for lack of venue, reasoning that perjury lies only in the district where the oath is taken.

The Court of Appeals for the Second Circuit reversed, holding that venue properly lay in the Southern District of New York, since the venue for prosecution of a crime may be determined from the nature of the crime charged as well as the location of the act or acts constituting it. The court noted that defendant's deposition was taken in San Francisco for his convenience, and it was uncontested that the deposition was taken pursuant to southern district rules. United States v. Reed, 773 F.2d 447 (1985), 22 CLB 165.

29. PRELIMINARY PROCEEDINGS

§ 29.00 Grand jury proceedings

U.S. Supreme Court A California grand jury returned a murder indictment against defendant, and he was subsequently convicted of first-degree murder. After exhausting his remedies in state court over a sixteen-year period, he filed a habeas corpus petition in federal court, alleging that the exclusion of blacks from the grand jury denied him equal protection. The district court granted relief, and the Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court affirmed, holding that the long-standing rule requiring reversal of convictions when members of the defendant's race were systematically excluded from the grand jury would not be abandoned in this case on the theory that the discrimination amounted to harmless error and that defendant's conviction after a fair trial purged any taint attributable to the grand jury process. The Court reasoned that a jury conviction does not suggest that discrimination did not impermissibly infect the framing of the indictment. Vasquez v. Hillery, 106 S. Ct. 617 (1986), 22 CLB 378.

U.S. Supreme Court A federal grand jury returned an indictment charging the defendants with narcotics and conspiracy charges. It later expanded the conspiracy charges in a superseding indictment. Two law enforcement agents testified in tandem before the grand jury regarding the superseding indictment. The defendants were found guilty at trial, and the district court denied their motion to dismiss the superseding indictment. The Court of Appeals for the Fourth Circuit reversed the conspiracy convictions, holding that the dual testimony of the agents tainted only that portion of the indictment.

The Supreme Court affirmed in part and reversed in part, holding that the trial jury's guilty verdict rendered harmless any error in the grand jury's indictment that may have flowed from the claimed error. The Court further commented that the societal costs of retrial were far too substantial to justify setting aside the verdict because of an error at the grand jury

phase. United States v. Mechanik, 106 S. Ct. 938 (1986), 22 CLB 379.

Court of Appeals, 2d Cir. The subjects of a grand jury investigation moved to vacate an ex parte order allowing disclosure of grand jury material for use in a civil case against them. The district court granted an ex parte order allowing disclosure of grand jury materials to the Civil Division of the Justice Department.

The Court of Appeals for the Second Circuit reversed and remanded, holding that while disclosure of grand jury materials under Rule 6(e) could be sought by an ex parte order, the government had failed to demonstrate the particularized need required to authorize disclosure. The court noted that, because of the availability of alternative discovery tools available to the Antitrust Division, the division could have made information available to the Civil Division without the necessity of disclosing grand jury information. The court further found that the order failed to particularize what grand jury materials would be disclosed. In re Grand Jury Investigation, 774 F.2d 34 (1985), 22 CLB 160.

Court of Appeals, 6th Cir. After defendant was convicted in the district court of extortion and conspiracy to obstruct interstate commerce by force and violence, he appealed on the ground that the grand jury had improperly sworn in a federal investigative agent as an "agent of the grand jury."

The Court of Appeals for the Sixth Circuit affirmed, holding that the swearing-in of the agent was not prosecutorial misconduct and did not warrant dismissal of the indictment. The court reasoned that absent a showing of prejudice, such as a showing that the defendant would not have been indicted but for the swearing-in, the questioned practice would not undermine the foundation of public trust and confidence in the grand jury system. The court further found that the district court did not abuse its discretion by denying defendant's request for an evidentiary hearing. United States v. Jones, 766 F.2d 994 (1985), 22 CLB 75.

§ 29.05 —Subpoenas

Court of Appeals, 2d Cir. Defendant brought a motion to quash a grand jury subpoena served on his attorney calling for documents relating to fee arrangements, which was denied in the district court.

The Court of Appeals for the Second Circuit reversed, holding that the subpoena was not being used for a proper grand jury purpose, since its primary purpose was for trial preparation. The court noted that the evidence had been previously sought by means of a trial subpoena, and there was no indication that the government's intent shifted merely because a grand jury subpoena was substituted for the trial subpoena. *In re* Grand Jury Subpoena, 767 F.2d 26 (1985), 22 CLB 76.

Court of Appeals, 2d Cir. After a grand jury subpoena was issued on an individual calling on him to produce a tape recording in his possession of conversations in which he and others discussed the payment of sales taxes and a sales tax audit, he was held in contempt by the district court for failing to comply.

The Court of Appeals for the Second Circuit affirmed, holding that the tapes were not protected by the Fifth Amendment, since they pertained primarily to business matters. The court noted that the government had obtained an order directing the individual to provide the grand jury with the subpoenaed tape recording and granted him immunity for the act of producing the subpoenaed material. *In re* Grand Jury Proceedings, 767 F.2d 39 (1985), 22 CLB 77.

Court of Appeals, 5th Cir. After the district court issued an order enforcing an IRS subpoena issued against the president of a liquor company, he appealed on the ground that he did not possess the subpoenaed documents. The subpoena required production of accounts receivable ledgers for a three-year period.

The Court of Appeals for the Fifth Circuit affirmed, holding that a corporate officer cannot defeat an IRS subpoena merely by asserting that the records are not in his possession. The court noted that while lack of possession and control of summoned documents is a valid defense to an IRS application for an enforcement order, the party resisting enforcement bears the burden of producing credible evidence that he does not possess or control the documents sought. United States v. Huckaby, 776 F.2d 564 (1985), 22 CLB 281.

§ 29.20 Bail

Court of Appeals, 2d Cir. After defendant was arrested on narcotics charges, the district court judge ordered him detained pending trial without bail after accepting the government's offer or proof without demanding further elaboration.

The Court of Appeals for the Second Circuit affirmed, noting that the presumption of flight set forth in the Bail Reform Act places on the defendant the burden of coming forward with evidence to rebut it. The court noted that Congress never intended detention hearings to resemble minitrials and that Congress was quite aware that the government might present information through proffers under the act. United States v. Martir, 782 F.2d 1141 (1986), 22 CLB 382.

§ 29.30 Competency proceedings

Court of Appeals, 2d Cir. After defendant was charged with criminal contempt, the district court judge ordered defendant to submit to a psychiatric examination to determine his dangerousness to the community and his mental competence to stand trial.

The Court of Appeals for the Second Circuit reversed in part and affirmed in part, holding that the Bail Reform Act does not authorize a judicial officer to order, as a condition of pretrial release, a psychiatric examination to determine a defendant's dangerousness. The court commented that dangerousness must be decided on the basis of the information available at the bail hearing. United States v. Martin-Trigona, 767 F.2d 35 (1985), 22 CLB 77.

31. PRETRIAL MOTIONS

§ 31.00 Sufficiency of indictment

§ 31.10 —Severance

U.S. Supreme Court After the district court denied defendants' pretrial motion for severance, they were convicted on mail fraud charges relating to arson. The Court of Appeals for the Fifth Circuit reversed and remanded for new trials, holding that misjoinder of the defendants was per se prejudicial.

The Supreme Court reversed, holding that misjoinder is subject to harmless-error analysis and is not reversible error per se. The Court explained that an error involving misjoinder affects substantial rights and requires retrial only if the misjoinder results in actual prejudice that has a substantial and injurious effect. In this case, the Court found that the claimed error was harmless in the face of overwhelming evidence of guilt. United States v. Lane, 106 S. Ct. 725 (1986), 22 CLB 379.

Court of Appeals, 2d Cir. After defendants were convicted in the district court of using bogus religious organizations to evade taxes, one of the defendants appealed on the ground that the district court improperly denied his severance motion.

The Court of Appeals for the Second Circuit affirmed, holding that the mere fact that one of the defendants participated in the conspiracy for a shorter time than his co-defendants, and was charged with failing to report less income than that charged against the other defendants, did not require severance. The court explained that both counts in which defendant was charged arose out of a common scheme in which all defendants participated, so joinder was proper. The court further noted that a conspirator is liable for the unlawful acts of his co-conspirators committed before and after his adoption of the conspiracy. United States v. Ebner, 782 F.2d 1120 (1986), 22 CLB 381.

Court of Appeals, 5th Cir. Following his state court conviction of aggravated burglary and possession of a firearm by a convicted felon, defendant appealed on the grounds that his severance motion had been improperly denied. The district court denied his habeas corpus petition.

The Court of Appeals for the Fifth Circuit affirmed, holding that the state court's denial of the severance motion did not violate the defendant's right to due process and a fair trial, even though the charge of possession of a firearm by a convicted felon revealed to the jury the prior burglary conviction on defendant's record. The court observed that there was no undue emphasis placed on the prior conviction, that there was no objection to the jury charge, and that the evidence of guilt was overwhelming. Breeland v. Blackburn, 786 F.2d 1239 (1986), 22 CLB 479.

Court of Appeals, 8th Cir. After the defendants were convicted in the district court of attempted arson and mail fraud, they appealed. One defendant claimed that his motion to sever had been improperly denied where she asserted that she would have been able to examine co-defendant at a separate trial as to the fact that the co-defendant had ordered the insurance on the burned property.

The Court of Appeals for the Eighth Circuit reversed in part on other grounds, holding that the defendant was not entitled to a severance solely because the co-defendant could not legally testify as to the ordering of the insurance. The court noted that, in order to be entitled to a severance, the defendant must show not only that the co-defendant would be called at a separate trial and that the co-defendant would testify, but also that the testimony would be exculpatory. United States v. Voss, 787 F.2d (1986), 22 CLB 480.

33. GUILTY PLEAS

§ 33.00 Plea bargaining

Court of Appeals, 4th Cir. After pleading guilty in the district court to having conducted a continuing criminal enterprise and filing false tax statements, the defendant moved to withdraw the plea on the ground that the government had violated a plea bargain agreement. The district court denied the motion.

On appeal, the Court of Appeals for the Fourth Circuit affirmed, holding that the government did not violate its agreement not to use defendant's statements by providing information based on his statements to the probation department indicating that his drug activities continued during the period he was under investigation. The court reasoned that the promise not to use defendant's statements related to possible future prosecutions, not to sentencing procedures that gave effect to the guilty plea the defendant had already entered into. United States v. Rekmeyer, 786 F.2d 1216 (1986), 22 C.L.B. 478.

§ 33.45 Involuntariness of plea

§ 33.55 —Promises

U.S. Supreme Court Defendant pleaded guilty in the district court to an information charging him with mail fraud after the government had agreed, as part of a plea bargain, to recommend probation on condition that restitution be made. At sentencing, defense counsel pointed out that the sentence report incorrectly stated that the government would stand silent. Counsel informed the court that the government instead recommended probation with restitution, whereupon the Assistant United States Attorney stated: "This is an accurate representation." On appeal, the court of appeals reversed, concluding that the government had breached its plea bargain by making no effort to explain its recommendation.

The Supreme Court reversed, holding that the government was under no implied-in-law requirement to explain its reasons or to make its recommendation "enthusiastically." United States v. Benchimol, 105 S. Ct. 2103 (1985), 22 CLB 71.

34. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 34.40 Character and reputation evidence

Court of Appeals, 3d Cir. After the defendant was convicted in the district court of the Virgin Islands of assault in the third degree, he appealed on the ground that he had been improperly denied a "good character" charge.

The Court of Appeals for the Third Circuit affirmed the conviction, holding that testimony of the absence of prior arrests is not admissible as character evidence and does not entitle a defendant to a good character charge. The court noted that while a defendant may introduce evidence of his own good character in order to suggest that he could not have committed the crime, specific instances of conduct—or, as in this case, the absence thereof—may not be introduced. The court further noted that evidence as to the absence of specific bad acts is generally less probative of good character than general reputation or opinion evidence. Government of the Virgin Islands v. Grant, 775 F.2d 508 (1985), 22 CLB 280.

§ 34.45 Proof of other crimes to show motive, intent, etc.

Court of Appeals, 4th Cir. After defendant

was convicted in the district court of three Travel Act violations and one narcotics conspiracy charge, he appealed on the ground that hearsay evidence had been improperly admitted against him.

The Court of Appeals for the Fourth Circuit affirmed in part and reversed in part on other grounds, holding that testimony of a government witness about prior drug transactions between himself and the defendant was admissible on the theory that it tended to prove intent, scheme, opportunity, or a business enterprise. The court observed that the government's failure to specify one or more of these purposes in offering the evidence did not render the testimony inadmissible by precluding the district court from balancing its probative value against the damage of undue prejudice. United States v. Gallo, 782 F.2d 1191 (1986), 22 CLB 382.

Court of Appeals, 7th Cir. After defendants were convicted in the district court for conspiracy to obstruct justice by corruptly influencing a witness who refused to testify before a federal grand jury, one of the defendants argued on appeal that a taped conversation regarding a prior, unsuccessful bribe attempt was improperly admitted at trial.

The Court of Appeals for the Seventh Circuit affirmed the conviction, holding that evidence of defendant's prior attempt to obstruct justice by attemting to bribe the silence of a witness was relevant and probative of his current intent to obstruct the grand jury's investigation of his loan sharking activity. The court noted that a prior criminal act is admissible if (1) the prior act is similar enough and close enough in time to be relevant; (2) the evidence of the prior act is clear and convincing; (3) the probative value of the evidence outweighs the risk of prejudice; and (4) the issue to which the evidence is addressed is disputed by the defendant. United States v. Arnold, 773 F.2d 823 (1985), 22 CLB 162.

§ 34.85 Opinion evidence

Court of Appeals, 4th Cir. After defendant was convicted in district court of possession of heroin and marijuana with intent to distribute, he appealed on the ground that the opinion evidence of two investigative agents had been improperly admitted. The agents testified that the heroin found in the defendant's residence ranged from 14 percent to 18 percent pure, whereas heroin upon distribution to a user ranges from one percent to 3 percent pure.

The Court of Appeals for the Fourth Circuit affirmed, holding that the trial court did not err in admitting the opinion evidence, since the agents were relying on their twelve to eighteen years of experience in investigating heroin distribution. United States v. Monu, 782 F.2d 1209 (1986), 22 CLB 383.

§ 34.95 Identification evidence

Court of Appeals, 3d Cir. After the defendant was convicted in district court on charges arising out of three bank robberies, he appealed on the ground that he should have been permitted to introduce psychiatric evidence of the unreliability of eyewitness testimony.

The Court of Appeals for the Third Circuit affirmed in part, and vacated and remanded in part, holding that the defendant should have been entitled to a hearing to determine the admissibility of a psychologist's testimony regarding the reliability of eyewitness identification. The court specifically noted that the identification testimony here was crucial to the government's case and the officer observed the defendant for only forty-nine seconds under highly stressful circumstances and did not identify the defendant until eighteen months later. United States v. Sebetich, 776 F.2d 412 (1985), 22 CLB 281.

§ 34.135 Privileged communications

U.S. Supreme Court After petitioner filed a complaint in the district court alleging violations of the Commodity Exchange Act, the respondent entered into a consent decree whereby his corporation agreed to have a trustee in bankruptcy appointed. The respondent then refused to answer questions at a deposition, asserting the attorney-client privilege. The petitioner then obtained a waiver of the privilege from the trustee as to any communication occurring prior to the date of his appointment as a receiver. The district court upheld a magistrate's order directing the respondent to testify, but the court of appeals reversed.

The Supreme Court reversed, holding that the trustee of a corporation has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. The Court reasoned that when control of a corporation passes to new management, the authority to assert and waive the privilege also passes. Commodities Futures Trading Comm'n v. Weintraub, 105 S. Ct. 1986 (1985), 22 CLB 69.

Court of Appeals, 7th Cir. After defendants were convicted in the district court of various drug charges, they appealed, arguing that tape recorded conversations between the married co-defendants had been improperly admitted at trial.

The Court of Appeals for the Seventh Circuit affirmed, holding that the marital privilege does not prohibit the admission of recorded conversations between married co-defendants. The court reasoned that neither the "adverse testimony privilege," which may be asserted by a witness-spouse, nor the "confidential communications privilege," which may be asserted by a defendant-spouse, was applicable here, since neither privilege applies where both parties are "joint participants" in a crime. United States v. Keck, 773 F.2d 759 (1985), 22 CLB 159.

§ 34.150 Expert witness

Court of Appeals, 2d Cir. The defendant was convicted in district court on narcotics charges, and he appealed on the ground that the undercover officer who testified in the case should not also have been permitted to testify as an expert witness.

The Court of Appeals for the Second Circuit affirmed the conviction, holding that it was not manifest error for the trial judge to permit the undercover officer to testify that street drug sales in Harlem generally involved the use of a "steerer." The court had greater concern about the officer's testimony that the defendant himself was a "steerer" because that was an ultimate issue of fact to be decided by the jury. The court, however, decided that the testimony was admissible, since the officer's expert testimony was not essential to the establishment of a prima facie case against the defendant. United States v. Brown, 776 F.2d (1985), 22 CLB 281.

Court of Appeals, 5th Cir. After the defendant was convicted in the district court of extortion and conspiracy to commit extortion, he appealed on the grounds that expert testimony on the reliability of eyewitness identification had been improperly excluded.

The Court of Appeals for the Fifth Circuit affirmed, holding that the exclusion of expert testimony on the reliability of eyewitness testimony was not in error. The court held that although such expert testimony may be admitted at the court's discretion, there is no basis to rule that such testimony must be admitted. The court also found that, in this case, the evidence of guilt was overwhelming even if the eyewitness identifications were completely disregarded. United States v. Moore, 786 F.2d 1308 (1986), 22 CLB 480.

§ 34.220 Hearsay evidence

Court of Appeals, 4th Cir. After defendant was convicted in the district court of various drug-related offenses, he appealed, inter alia, on the ground that out-of-court statements had been improperly admitted at trial.

The Court of Appeals for the First Circuit affirmed, but held that co-defendant's court statements were not inadmissible hearsay, since they were offered not for the truth of the matter asserted but for the limited purpose of explaining why a government investigation was undertaken and why the officers made the preparations that they did in anticipation of defendant's arrest. United States v. Love, 767 F.2d 1052 (1985), 22 CLB 73.

§ 34.225 Admissions and confessions
§ 34.235 —Declarations of co-conspirators

Court of Appeals, 1st Cir. After the two defendants were convicted in district court of conspiracy and possession of cocaine, they appealed, arguing, among other things, that the co-defendant's postarrest statement should not have been admitted against the other defendant.

The Court of Appeals for the First Circuit affirmed, but held that co-defendant's postarrest statements were hearsay as to the defendant and were not admissible as to him, since they were not made in

furtherance of the conspiracy. The court found, however, that their admission was harmless beyond a reasonable doubt, since they were merely cumulative to a mass of similar evidence already introduced against the defendant. United States v. Parlow, 777 F.2d 52 (1985), 22 CLB 278.

Court of Appeals, 5th Cir. After the defendants were convicted in the district court of offenses resulting from a fraudulent investment scheme, they appealed. One of the defendants claimed that the district court failed to sever his case or to give proper limiting instructions when the testimony of a co-defendant referring to him was admitted without redaction.

The Court of Appeals for the Fifth Circuit affirmed the conviction, holding that in view of the overwhelming evidence against the defendant, the failure of the court to order redaction of co-defendant's grand jury testimony did not prejudice the defendant. The court found that the references to the defendant in the unredacted grand jury testimony was relatively innocuous, since two of the references were probably exculpatory, one referred to a document already in evidence, and one referred to a friend of the defendant. United States v. Lewis, 786 F.2d 1278 (1986), 22 CLB 479.

§ 34.240 —Documentary evidence

Court of Appeals, 2d Cir. After defendant was convicted in the district court for filing false claims against the government, conspiracy, and racketeering, he appealed on the ground that Swiss bank records had been improperly admitted because he had not been given notice of the hearing at which the records were authenticated.

The Court of Appeals for the Second Circuit affirmed, holding that the admission of the Swiss bank records did not violate defendant's Sixth Amendment right of confrontation. The court explained that the Confrontation Clause does not preclude the admission of all extrajudicial statements made when the defendant is not present as long as the statement has sufficient indicia of reliability to assure an adequate basis for evaluating the truth of the declaration. The court further noted that the records here had a high indicia of reliability, since defendant had admitted to their authenticity. United States v. Davis, 767 F.2d 1025 (1985), 22 CLB 77.

WEIGHT AND SUFFICIENCY

§ 34.265 Sufficiency of evidence

Court of Appeals, 6th Cir. After defendant was convicted in the district court of income tax evasion, he appealed on the ground that the evidence offered at trial was insufficient to support the conviction.

The Court of Appeals for the Sixth Circuit affirmed the conviction, holding that the evidence that the defendant failed to declare as income checks made out to a corporation and deposited in his personal checking account was sufficient to support the conviction. The court reasoned that since the proceeds from the checks were in the defendant's possession and he was in a position to dispose of the money at will, the proceeds should have been reported by him in his gross income. United States v. Curtis, 782 F.2d 593 (1986), 22 CLB 385.

35. THE TRIAL

§ 35.05 Defendant's right to continuance

Court of Appeals, 5th Cir. After defendant was convicted in the district court of various drug offenses and wire fraud, he appealed on the ground that the trial court improperly denied his motion to reopen the evidence to permit him to testify in his own defense. Defendant did not make the motion until after the defense case and the government's rebuttal had closed.

The Court of Appeals for the Fifth Circuit reversed, holding that weighing the defendant's excuse together with the seriousness of the crimes with which he was charged, the nature and potential scope of his testimony, and the absence of any prejudice to the government or hardship to the court if reopening were allowed, the district court clearly should have allowed the defense to put the defendant on the stand. United States v. Walker, 772 F.2d 1172 (1985), 22 CLB 162.

§ 35.20 Absence of defendant or counsel

Court of Appeals, 7th Cir. After defendant was convicted in the district court of criminal contempt, he appealed on the ground,

inter alia, that he had been denied his right to be present during jury deliberations.

The Court of Appeals for the Seventh Circuit remanded on other grounds, holding that defense counsel had plainly waived his right to be present at the reading of the jury's verdict and the poll of the jury on that verdict. The court was concerned, however, about the procedure whereby defense counsel waived both his own right to be present as well as that of the defendant. Nevertheless, the court found no prejudice in the absence of defendant during jury deliberations, since the trial judge responded to jury questions in a "neutral and nonsubstantive manner." United States *ex rel.* SEC v. Billingsley, 766 F.2d 1015 (1985), 22 CLB 76.

§ 35.25 Decisions of defense counsel as binding upon defendant

Court of Appeals, 4th Cir. After defendant was convicted in the district court of tax evasion, he appealed on the ground that his attorney's statements to an IRS auditor had been improperly used against him.

The Court of Appeals for the Fourth Circuit affirmed, holding that statements made by the attorney to the auditor regarding additional unreported income was admissible in a subsequent tax prosecution where the statement was made by the attorney during the course of representation. The court noted that defendant had waived any confidentiality privileges by authorizing the attorney to represent him before the auditor. United States v. Martin, 773 F.2d 579 (1985), 22 CLB 165.

§ 35.50 Conduct of trial judge

Court of Appeals, 7th Cir. After defendant was convicted of burglary in Wisconsin state court, he sought habeas corpus relief in the district court on the ground that he had been denied his rights to effective assistance of counsel and to trial by an unbiased tribunal. The district court denied the petition.

The Court of Appeals for the Seventh Circuit reversed, holding that defendant was deprived of his constitutional right to assistance of counsel where the state trial judge implied that the court-appointed defense counsel would jeopardize his chance of future appointments by pressing too hard during trial. The court commented that while there was no proof that defense counsel "pulled his punches" at trial, he had a conflict of interest between his client and himself. Walberg v. Israel, 766 F.2d 1071 (1985), 22 CLB 76.

§ 35.95 Conduct of prosecutor

Court of Appeals, 6th Cir. After his conviction in Michigan state court for first degree murder, defendant filed a habeas corpus petition in federal court, claiming multiple constitutional violations at his trial. The district court denied the petition.

On appeal, the Court of Appeals for the Sixth Circuit affirmed, holding that while the prosecutor's comments on defendant's silence during the search of his blue Ford "approached the outer limits of fundamental fairness," the comments were harmless error. The court noted that the most incriminating part of the transaction was not defendant's silence during the search, but rather defendant's misstatement as to the location of the vehicle and the presence of defendant's identification in the car along with the murder weapon. The court also found that the prosecutor's comments to the jury that it was their civic duty to convict him because the victim "will never get out of that pine box" was not prejudicial error. Martin v. Foltz, 773 F.2d 711 (1985), 22 CLB 167.

§ 35.100 Discretion to prosecute

§ 35.105 —Improper questioning of witnesses

Court of Appeals, 5th Cir. After defendant was convicted in the district court of conspiring to file false tax returns and related charges, he appealed, arguing that the admission of prejudicial remarks by a government witness constituted reversible error.

The Court of Appeals for the Fifth Circuit affirmed, holding that it was not plain error to admit, on redirect, testimony of a government witness that the defendant had physically abused her and forced her to have an abortion. The court reasoned that the redirect testimony was a legitimate effort to rehabilitate the witness's credibility in the face of her admission on cross-examination that she had run over defendant with a car and had fired shots in his presence. United States v. Austin, 774 F.2d 99 (1985), 22 CLB 161.

36. THE JURY

SELECTION

§ 36.10 Systematic exclusion of minority group members

Court of Appeals, 1st Cir. After his conviction in Massachusetts state court on narcotic charges, and denial of his appeal in the state appellate courts, defendant sought a writ of habeas corpus in the federal court, arguing that he had been denied his constitutional right to an impartial jury by the alleged systematic exclusion of young people from the jury panels. A report on the subject indicated that young adults (age 18-34) were underrepresented by 50 percent in the jury selection process. The district court denied the petition.

On appeal, the Court of Appeals for the First Circuit affirmed the denial, holding that "young adults" are not a "distinctive" group required to be proportionately represented in jury panels. The court observed that a distinctive group requiring representation must be defined and limited by some clearly identifiable factor, requiring that a common thread or basic similarity in attitude, ideas, or experience run through the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process. Barber v. Ponte, 772 F.2d 982 (1985), 22 CLB 163.

§ 36.20 Exclusion of jurors in capital cases

Missouri Defendant was convicted of capital murder, first-degree robbery, three counts of sodomy, and four counts of kidnapping. He was sentenced to death for the capital murder conviction. Before trial, potential jurors were excused for cause when they stated that they could not, under any circumstances, assess a death sentence on defendant if the jury found him guilty. On appeal, defendant argued that the trial court erred in allowing the state to disqualify jurors opposed to the dealth penalty, resulting in a "conviction-prone" jury, thereby violating his constitutional right to a fair and impartial jury.

The Missouri Supreme Court affirmed defendant's conviction and death sentence. The court ruled that the exclusion for cause of jury panel members who state on voir dire that they could not, under any circumstances, assess that the death sentence did not violate defendant's constitutional right to a fair and impartial jury. The court stated that it did not know of any decision that:

> [E]ven remotely suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly stated that they would ignore the law and the instructions of the trial judge, and decide the issue of punishment not on the basis of what the law is, but only on the basis of what they think it should be under their own standards.

State v. Nave, 694 S.W.2d 729 (1985), 22 CLB 176.

INSTRUCTIONS

§ 36.85 Duty to charge on defendant's theory of defense

Court of Appeals, 2d Cir. Defendant, a New York state senator, was convicted after trial on mail fraud, tax evasion, and related charges. On appeal, one of his grounds for reversal was that the trial court had erred in instructing the jury that political contributions used for personal purposes constituted taxable income.

The Court of Appeals for the Second Circuit reversed the conviction, holding that the failure to submit to the jury the issue as to whether political contributions received by the defendant and used for personal, rather than political, purposes were nontaxable gifts on taxable income constituted plain error. The court noted that one of defendant's central contentions at trial was that the money contributed to his campaign by his supporters constituted nontaxable gifts to him because the money was donated without restriction as to use. The court thus concluded that it was unfair not to treat the issue as a factual one for the jury to decide. United States v. Pisani, 773 F.2d 397 (1985), 22 CLB 165.

§ 36.110 Intent and willfulness

U.S. Supreme Court Defendant, a state prisoner, filed a petition for habeas corpus relief after his murder conviction was affirmed on appeal. The district court denied relief, but the Court of Appeals for the Eleventh Circuit reversed. At trial, the jury had been instructed that "a person of sound mind and discretion is presumed to

intend the natural and probable consequences of his acts, but the presumption may be rebutted."

The Supreme Court affirmed, holding that a jury instruction that creates a mandatory presumption whereby the jury may infer intent violates the Due Process Clause, since it relieves the State of the burden of persuasion on an element of an offense. The Court commented that the fact that the jury was informed that the presumption was rebuttable did not cure the infirmity in the charge, since the jury could have understood the charge to mean that they were required to infer intent to kill from the act of firing a pistol unless the defendant persuaded the jury that such reference was unwarranted. Francis v. Franklin, 105 S. Ct. 1965 (1985), 22 CLB 69.

U.S. Supreme Court Defendant was convicted in the district court of unlawfully acquiring and possessing food stamps (7 U.S.C. § 2024(b)). At the trial, the government proved that he had purchased food stamps from an undercover agent for substantially less than face value. The trial court rejected defendant's proposed jury instruction that the government must prove that he knowingly did an act that the law forbids and purposely intended to violate the law. Instead, the court instructed the jury that the government had to prove that defendant acquired and possessed the food stamps in a manner not authorized by statute and that he knowingly and willfully acquired the stamps. The court of appeals affirmed the conviction.

The Supreme Court reversed, holding that even though Congress failed to explicitly indicate whether mens rea is required, a conviction under Section 2024(b) requires a finding that defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulation. The Court noted that criminal offenses requiring no mens rea have a generally disfavored status. Liparota v. United States, 105 S. Ct. 2084 (1985), 22 CLB 69.

Court of Appeals, 2d Cir. A corporation, its president, and its general manager were convicted in the district court of various counts of conspiracy, false filing of tax returns, and aiding and assisting the filing of employees' false tax returns in connection with payments to employees without withholding taxes. On appeal, the defendants argued, among other things, that the government had failed to prove actual knowledge.

The Court of Appeals for the Second Circuit affirmed the conviction, holding that while knowledge of the law is an essential element under the tax statute, the "deliberate ignorance" instruction given by the trial court was correct, since the defendants' "willful blindness to the existence of the fact" that their employees were not independent contractors could properly have been considered by the jury. Moreover, the court noted that knowledge of the law was inferable and proven from the fact that the defendants did indeed pay withholding on behalf of union employees during their regular work weeks. United States v. MacKenzie, 777 F.2d 811 (1985), 22 CLB 280.

Court of Appeals, 5th Cir. When defendant was convicted after a jury trial of willfully attempting to evade income taxes, he appealed on the ground that the jury had been improperly instructed as to the elements of the crime.

The Court of Appeals for the Fifth Circuit affirmed, holding that the trial court was not required to list willfulness as a separate element and to give a specific instruction on willfulness in an income tax prosecution. The court noted that where the trial judge made clear that willfulness of the crime of attempting to evade income tax must be proved beyond a reasonable doubt, the trial court's failure to list the element of willfulness as a separate element did not render the charge erroneous. As long as the court made it sufficiently clear that the government was required to prove that defendant violated a known legal duty, failure of the court to give a specific instruction on intent did not render the instruction erroneous. United States v. Hughes, 766 F.2d 875 (1985), 22 CLB 75.

Court of Appeals, 7th Cir. After the defendants were convicted of mail fraud in the district court, they appealed on the ground that the court improperly gave an "ostrich" instruction, which essentially states that a person cannot intentionally avoid knowledge by closing his eyes to

facts that should prompt further investigation.

The Court of Appeals for the Seventh Circuit affirmed in part, holding that the giving of an "ostrich" instruction was proper where police officers who submitted false accident reports argued that they were innocent dupes. The court commented that the jury is entitled to be told that a person who "smells a rat" and then avoids actual knowledge may already know enough for the purpose of the law. United States v. Schwartz, 787 F.2d 257 (1986), 22 CLB 481.

§ 36.135 Guilt based on recent and exclusive possession

Court of Appeals, 1st Cir. After the defendant was convicted in the district court of possession and interstate transportation of stolen goods, he appealed on the grounds that the jury instructions improperly shifted the burden of proof. The court had charged that the unexplained possession of recently stolen property in a state other than the one from which the property is stolen is ordinarily a circumstance from which the jury may reasonably draw the inference that the person in possession knew the property was stolen.

The Court of Appeals for the First Circuit affirmed, holding that the instructions did not shift the burden of proof on the issue of the state of mind of the defendant. The court noted that the trial judge had emphasized to the jury that they were not required to make such an inference. United States v. Thuna, 786 F.2d 437 (1986), 22 CLB 481.

37. POST-TRIAL MOTIONS

§ 37.35 Federal habeas corpus

U.S. Supreme Court A Pennsylvania state prisoner temporarily confined in the Philadelphia county jail brought a federal civil rights suit against various county officials, alleging that they had beaten and harassed him. The federal magistrate issued a habeas corpus writ directing state prison officials to transport the prisoners to the county jail nearest the federal court, and then directing the U.S. Marshal Service to transport the prisoners from the county jail to federal court. The court of appeals reversed the order.

The Supreme Court affirmed, holding that the All Writs Act does not confer power on the district court to compel noncustodians to bear the expense of producing the prisoner-witnesses. The Court further found that the All Writs Act does not authorize courts to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. Pennsylvania Bureau of Correction v. United States Marshal Service, 106 S. Ct. 355 (1985), 22 CLB 276.

§ 37.55 —Waiver or deliberate bypass

Court of Appeals, 5th Cir. After defendant was convicted of murder in Louisiana state court, he filed a petition seeking a writ of habeas corpus on the ground that the state prosecutor had improperly commented on his postarrest silence. The district court denied the petition.

On appeal, the Court of Appeals for the Fifth Circuit affirmed, holding that defendant raised no adequate claims for relief since he failed to explain why he raised no objections at trial to the prosecutor's comments on his postarrest silence. The court also noted that the prosecutor's cross-examination of defendant did not refer to his silence in the grand jury; rather, it was defendant who raised this issue through his own objections at trial. Webb v. Blackburn, 773 F.2d 646 (1985), 22 CLB 166.

§ 37.60 —Burden of proof

U.S. Supreme Court The defendant confessed to murder after a fifty-eight-minute interrogation by the New Jersey State Police. At trial, he was found guilty of first-degree murder, but the New Jersey appellate court reversed, finding that the confession was the result of compulsion. The New Jersey Supreme Court then reversed, finding that the confession was voluntary, and the district court dismissed his petition for habeas corpus without an evidentiary hearing. The Court of Appeals for the Third Circuit affirmed, holding that the state court's factual findings should be presumed to be correct.

The Supreme Court reversed, holding that the voluntariness of a confession is not an issue of fact to be presumed, but is a legal question meriting independent con-

sideration in a federal habeas corpus proceeding. The Court noted that, unlike such issues as impartiality of a juror or competency to stand trial, the voluntariness of a confession cannot be presumed because the taking of a confession invariably occurs in a secret and more coercive environment. Miller v. Fenton, 106 S. Ct. 445 (1985), 22 CLB 277.

§ 37.65 —Procedure

Court of Appeals, 5th Cir. After having been convicted of the crime of escape and given a life sentence in Texas state court, defendant was cited for abuse for having filed several state habeas corpus petitions. He then filed three federal habeas corpus petitions, all of which were denied. Having filed his fourth habeas corpus petition, the state moved to dismiss for abuse of the writ, and the federal magistrate recommended that the petition be dismissed because the issues were substantially raised in prior petitions or should have been previously raised. The district court then dismissed the petition without granting a hearing or permitting petitioner to submit a form on which to explain his failure to previously raise the issues.

The Court of Appeals for the Fifth Circuit vacated and remanded, holding that a petitioner must be given specific notice that the court is considering dismissal and at least ten days in which to explain the failure to raise new grounds in a prior petition. Urdy v. McCotter, 773 F.2d 653 (1985), 22 CLB 166.

Court of Appeals, 5th Cir. A habeas corpus petitioner facing the death penalty applied to the district court for a certificate of probable cause and a stay of execution, which was denied.

The Court of Appeals for the Fifth Circuit affirmed the denial of the application, holding that new claims in successive habeas corpus petitions must be dismissed if competent counsel should have been aware of the claims at the time of the prior petitions. The court also found that the issue of whether persons with scruples against the death penalty had been systematically excluded from the jury had been squarely raised in defendant's previous petition, and it was thus an abuse of the writ to raise the issue again. Moore v. Blackburn, 774 F.2d 97 (1985), 22 CLB 160.

38. SENTENCING AND PUNISHMENT

SENTENCING

§ 38.10 Pre-sentence report

§ 38.20 —Trial court's reliance on material not contained in pre-sentence report

Court of Appeals, 4th Cir. After defendant was convicted in the district court of kidnapping and murder charges, he appealed on the ground that the sentencing judge improperly considered certain testimony.

The Court of Appeals for the Fourth Circuit affirmed, holding that the sentencing court did not err in considering testimony given outside the jury's presence that had been excluded at trial, since defendant had an opportunity to challenge the testimony at the time of sentencing. The court pointed out that defendant had stated at the sentencing hearing that he did not even know the witness and challenged the part of the presentence report that dealt with the witness's testimony. United States v. Hill, 766 F.2d 856 (1985), 22 CLB 75.

§ 38.30 Standards for imposing sentence

U.S. Supreme Court Defendant was convicted of murder in Mississippi state court and sentenced to death by the jury. During the sentencing stage of the trial, the prosecutor urged the jury not to view itself as finally determining whether defendant would die, because the death sentence would be reviewed for correctness by the Mississippi Supreme Court. That court unanimously affirmed the conviction.

The Supreme Court vacated the death sentence, adding that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who was led to believe, as here, that the responsibility for determining the appropriateness of defendant's death sentence rested elsewhere. The Court noted that a "delegation" of sentencing responsibility would deprive a defendant of a fair determination of the appropriateness of his death, since appellate courts are ill-suited to perform that function. Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), 22 CLB 72.

§ 38.50 Resentencing

U.S. Supreme Court After the defendant

was convicted in Pennsylvania state court for forgery and theft, he was sentenced to two-to-five years of imprisonment on a single theft count and five years of probation on one of the forgery counts. Sentence was suspended on the remaining counts. On appeal, the Pennsylvania Supreme Court affirmed the lower appellate court's ruling that the statute of limitations barred the prosecution of thirty-four of the theft counts, and it denied leave on double jeopardy grounds for resentencing on the remaining theft counts for which sentence had been suspended.

The Supreme Court reversed and remanded, holding that, when a sentence of imprisonment on certain counts is vacated on appeal, the double jeopardy clause does not bar resentencing on other counts for which sentencing had been suspended and which were affirmed on appeal. The Court noted that sentencing in a noncapital case does not have the qualities of constitutional finality that attend an acquittal, so the defendant could not claim any expectation of finality in his original sentencing. Pennsylvania v. Goldhammer, 106 S. Ct. 353 (1985), 22 CLB 275.

Court of Appeals, 4th Cir. After defendant was convicted of drug offenses, the court of appeals vacated in part and remanded for resentencing. He was initially sentenced on continuing criminal enterprise, charged to a sentence with no parole eligibility, followed by five years for cocaine conspiracy and distribution counts, which carry parole eligibility. After resentencing, defendant faced a sentence with no parole eligibility.

The Court of Appeals for the Fourth Circuit remanded for resentencing, holding that a more severe sentence imposed on resentencing raises a presumption of vindictiveness, and that the presumption was not rebutted by the trial court's express desire to effectuate its original sentence. The court noted that the resentencing judge did not identify any conduct or event justifying a more severe sentence, and even noted that defendant's two years in prison had resulted in some rehabilitation. United States v. Bello, 767 F.2d 1065 (1985), 22 CLB 73.

PUNISHMENT

§ 38.65 Increasing sentence upon retrial

U.S. Supreme Court After defendant was convicted of murder in Texas state court, he was sentenced by the jury to a twenty-year term. The trial judge granted defendant's motion for a new trial, and he was convicted again of murder. This time, however, defendant elected to have the judge fix his sentence. She imposed a fifty-year sentence. The Texas Court of Appeals reversed and sentenced defendant to twenty years, but the Texas Court of Criminal Appeals concluded that the case should have been remanded to the trial judge for resentencing.

The Supreme Court reversed, holding that the imposition of a greater sentence upon resentencing did not violate due process, since there was no evidence of vindictiveness. The sentencing judge had previously granted a motion for a new trial, and her reasons for imposing the longer sentence were set forth in a logical, on-the-record manner. Texas v. McCullough, 106 S. Ct. 976 (1986), 22 CLB 380.

§ 38.105 Consecutive sentences

Court of Appeals, 2d Cir. After the defendants were convicted in the district court for extortion and RICO offenses, they appealed on the grounds, among other things, that their consecutive sentences were improper.

The Court of Appeals for the Second Circuit affirmed, holding that the imposition of consecutive sentences for violations of separate RICO sections did not violate the double jeopardy clause. The court noted that a single transaction may give rise to liability for distinct offenses under separate statutes as long as the two offenses, as here, are sufficiently distinguishable. United States v. Biasucci, 786 F.2d 504 (1986), 22 CLB 482.

40. PROBATION AND PAROLE

§ 40.05 Revocation of probation

§ 40.10 —Procedure

U.S. Supreme Court After defendant pleaded guilty in Missouri state court to drug offenses, he was put on probation and given a suspended prision sentence. Two months later, he was arrested for leaving the scene of an automobile accident. After a hearing, the judge who had

sentenced defendant, finding that he had violated his probation conditions by committing a felony, revoked probation and ordered execution of the previously imposed sentence. Having exhausted his state remedies, defendant filed a habeas corpus petition, which was granted by the district court.

The Supreme Court reversed, holding that the Due Process Clause does not generally require a sentencing court to indicate that it had considered alternatives to incarceration before revoking probation. The Court noted that the procedures for revocation of probation—including written notice and the right to present witnesses and cross-examine—do not include or require an express statement by the factfinder that alternatives to incarceration were considered and rejected. Black v. Romano, 105 S. Ct. 2254 (1985), 22 CLB 71.

41. PRISONER PROCEEDINGS

§ 41.00 In general

U.S. Supreme Court After a Massachusetts prison inmate was charged with violating prior regulations following a fight, the disciplinary board refused to allow the inmate to call witnesses whom he had requested, but the record of the hearing did not indicate the board's reason for such refusal. The board found the inmate guilty, and he forfeited "good time" credits. The inmate then sought a writ of habeas corpus in Massachusetts state court, which was granted, and the Massachusetts Supreme Judicial Court affirmed.

The Supreme Court vacated and remanded, holding that the Due Process Clause does not require that prison officials' reasons for denying an inmate's witness request appear in the administrative record. The Court, however, did find that the officials must, at some point, state their reasons for refusing to call witnesses either in the administrative record or by later presenting testimony in court if the deprivation involves a "liberty" interest such as "good time" credits. Ponte v. Real, 105 S. Ct. 2192 (1985), 22 CLB 71.

Court of Appeals, 2d Cir. Former inmates of Attica Correctional Facility brought a suit against prison officials under Section 1983, claiming that their placement into protective custody violated their constitutional rights. Shortly after being placed in protective custody, the inmates were given a written statement of the reasons for doing so. The district court held certain officials liable.

The Court of Appeals for the Second Circuit reversed with instructions, holding that the inmates were not entitled to a formal hearing either prior to or shortly after their placement in protective custody. The court further noted that while the inmates may have had a protected liberty interest to remain in the general prison population under state law, there was no such federal constitutional interest that could serve as the basis for a Section 1983 claim. Deane v. Dunbar, 777 F.2d 871 (1985), 22 CLB 279.

Court of Appeals, 2d Cir. After an inmate filed a pro se civil rights action against corrections officials, the district court imposed sanctions by dismissing the complaint when the inmate, after answering questions for more than two hours, imposed Rule 30 to end the deposition.

The Court of Appeals for the Second Circuit reversed, holding that the district court improperly imposed sanctions, since the defendant did not violate any order of the court. The court noted that the defendant had ended the deposition on the theory that it would be oppressive for him to answer questions about documents that he had requested but had not received and digested. Salahuddin v. Harris, 782 F.2d 1127 (1986), 22 CLB 382.

Court of Appeals, 4th Cir. After a West Virginia state prisoner filed a petition challenging jail conditions, the district court judge referred the matter to a U.S. magistrate and then sustained the magistrate's recommendation to dismiss the petition.

The Court of Appeals for the Fourth Circuit reversed and remanded, holding that it was reversible error for the district court judge to fail to review the transcript of the testimony before the magistrate before approving the magistrate's findings. The court noted that while the magistrate may conduct an evidentiary hearing in a case, he lacks judicial authority to make a final determination. Thus, since a magistrate's determinations are subject to a final de novo review by a district court judge, the judge cannot ratify the magistrate's

finding without reviewing a transcript of the prior proceeding and permit the prisoner to object to specific findings of fact. Wimmer v. Cook, 774 F.2d 68 (1985), 22 CLB 161.

§ 41.15 Freedom of religion

Court of Appeals, 3d Cir. State inmates in New Jersey brought a civil rights suit challenging certain prison regulations on First Amendment grounds, including a regulation that prevented Islamic inmates from attending weekly religious services. The district court denied the inmates' request for injunctive relief and dismissed their damage claims.

The Court of Appeals for the Third Circuit vacated and remanded, holding that the state must show that the challenged regulations were intended to and do serve the important penological goal of security, and that no reasonable method exists by which the inmates' religious rights can be accommodated without creating bona fide security problems. Shabazz v. O'Lone, 782 F.2d 416 (1986), 22 CLB 385.

§ 41.25 Limitations on correspondence

Court of Appeals, 2d Cir. After an inmate filed a pro se civil rights complaint against prison officials alleging destruction of packages addressed to him and interception of outgoing mail, the district court dismissed the complaint for failure to state a claim upon which relief could be granted.

The Court of Appeals for the Second Circuit reversed and remanded, holding that the trial court should have given the prisoner the benefit of the doubt and treated the complaint as if it had been amended. The court noted that censorship of an inmate's mail is only justified if it furthers a substantial governmental interest in security, order, or rehabilitation. Washington v. James, 782 F.2d 1134 (1986), 22 CLB 383.

§ 41.40 Access to legal assistance and courts

Court of Appeals, 1st Cir. Jail inmates in Massachusetts brought a federal civil rights action alleging denial of their right to meaningful access to the courts. They alleged that an attorney was made available only once a week, and that there was no law library. The district court entered a judgment in favor of defendants.

The Court of Appeals for the First Circuit affirmed, holding that the inmate legal assistance program in a jail without a law library provided sufficient meaningful access to the courts, even though attorneys were able to consult with inmates only a few hours per week. The court noted that the attorneys assisted inmates in determining meritorious claims, helped inmates marshal facts, and provided assistance with legal forms and procedures. Carter v. Fair, 786 F.2d 433 (1986), 22 CLB 482.

§ 41.55 Medical treatment for prisoner

Court of Appeals, 4th Cir. After a prison inmate's civil rights action against the chief medical officer and others was dismissed on a magistrate's recommendations, he appealed.

The Court of Appeals for the Fourth Circuit affirmed in part and reversed in part, holding that allegations of inadequate medical care were insufficient to state a civil rights claim in the absence of deliberate indifference to serious medical needs. The court explained that disagreements between an inmate and a physician over the inmate's proper medical care do not state a claim under Section 1983 unless exceptional circumstances are alleged, and the claims here were claims of mere medical malpractice. Wright v. Collins, 766 F.2d 841 (1985), 22 CLB 74.

42. ANCILLARY PROCEEDINGS

CONTEMPT

§ 42.20 Punishment

Court of Appeals, 2d Cir. When a grand jury witness refused to answer questions in the grand jury, he was held by the district court to be in civil contempt and ordered to be confined until he ceased his recalcitrance. After incarceration for seven months, the district court judge released the witness, finding that there was no "realistic possibility" that continued confinement might cause him to testify. The government appealed.

The Court of Appeals for the Second Circuit affirmed, holding that the district

court did not err in discharging the witness from confinement. The court reasoned that there is no presumption that incarceration of eighteen months as authorized as the maximum confinement under the statute is mandatory. *In re* Parrish, 782 F.2d 325 (1986), 22 CLB 383.

DEPRIVATION OF CIVIL RIGHTS

§ 42.30 In general

U.S. Supreme Court Based on his monitoring of two telephone calls pursuant to a court-ordered wiretap, a Rhode Island state trooper prepared felony complaints charging respondents with possession of marijuana. The complaints were presented to a state judge, accompanied by arrest warrants and supporting affidavits. The judge signed the warrants and the respondents were arrested, but the charges were dropped when the grand jury failed to return an indictment. The respondents then brought a civil rights action against the trooper, but the district court gave a directed verdict for the trooper. The court of appeals reversed.

The Supreme Court affirmed, holding that petitioner was not entitled to absolute immunity, but only a qualified immunity, for liability for damages. The Court reasoned that absolute immunity should not be permitted, since the trooper's function in seeking the arrest warrants was similar to that of a complaining witness, and that complaining witnesses are not absolutely immune at common law. Malley v. Briggs, 106 S. Ct. 1092 (1986), 22 CLB 477.

U.S. Supreme Court When two deputy county sheriffs went to petitioner's medical clinic to serve notices on two of his employees, the petitioner barred the door and refused to let them enter. After consulting with the County Prosecutor, who instructed that they "go in and get" the employees, the door was broken down with an axe. When the petitioner brought a Section 1983 action, the district court dismissed the claim, finding that the officers were not acting pursuant to "official policy" because the acts complained of were an isolated instance. The court of appeals affirmed.

The Supreme Court reversed and remanded, holding that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986), 22 CLB 476.

Court of Appeals, 5th Cir. A jail inmate in Louisiana brought suit against the municipal body—a police jury—under Section 1983, claiming that the beating he suffered at the hands of four other inmates would have been less likely to happen if the jail had been better equipped and administered. The district court dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

The Court of Appeals for the Fifth Circuit affirmed, holding that although the subject matter could properly give rise to a Section 1983 claim, the complaint was properly dismissed, since it failed to state in detail how the jail was in any respect physically inadequate or that the police jury knew of its inadequacies. The court, however, remanded to permit the claimant to amend his complaint by alleging sufficient facts to support a claim. O'Quinn v. Manuel, 773 F.2d 605 (1985), 22 CLB 166.

EXTRADITION

§ 42.45 Requirements

Court of Appeals, 2d Cir. The United States, on behalf of the United Kingdom, sought a declaratory judgment reviewing an order of the district court denying extradition. The district court entered an order dismissing the action for failure to state a claim upon which relief can be granted.

The Court of Appeals for the Second Circuit affirmed, holding that the government could not bring a declaratory judgment action to collaterally review an order denying extradition. The court noted that the government was limited to the recourse of submitting the request to another extradition magistrate. United States v. Doherty, 786 F.2d 491 (1986), 22 CLB 482.

PART V—CONSTITUTIONAL GUARANTEES

43. ADMISSIONS AND CONFESSIONS

§ 43.35 Absence of counsel

Indiana Defendant was convicted of two counts of rape. He was arrested on the rape charges one day after he was released on a drug-related charge. When defendant was arrested on the basis of a warrant for delivery of a controlled substance, he was read his *Miranda* rights and was interrogated. Defendant denied any knowledge of the substance of the drug charge. He was again advised of his rights, and he waived them. He was then questioned about the rapes, having been named by an informant as a suspect before his arrest on the rape charges. Defendant denied any involvement in the rapes at that interrogation. Subsequently, defendant stated that he did not wish to talk any more until he consulted with an attorney. The investigating officer ceased questioning him, and he was returned to the jail cell where he was being held on the drug charge.

A juvenile investigator, who had been looking into a case of two runaway girls, then attempted to interrogate defendant, who lived near the girls, about that case. Defendant waived his *Miranda* rights and agreed to talk with the juvenile investigator. Defendant denied providing any assistance to the runaway girls. The investigator then questioned defendant about the rape charges, and defendant again denied any involvement. Defendant was released from jail on bond shortly thereafter. The next day, defendant was arrested and charged with the rapes. He was again advised of his *Miranda* rights, and he waived them. Defendant was again interrogated about the rapes and ultimately confessed to them. This confession was admitted into evidence at trial and used to help convict defendant. On appeal, defendant argued that his invocation of his right to counsel after his first arrest, on the drug charge, should have precluded the admission into testimony of his confession to the rapes after his second arrest on those charges.

The Indiana Supreme Court held that defendant's invocation of his right to counsel after his drug arrest did not preclude interrogation after his rape arrest the next day, when he had been released following his drug arrest, and was subsequently rearrested on the rape charges. The court stated that whether there has been a valid waiver of a defendant's right to remain silent and to consult with an attorney depends on the particular facts and circumstances of each case. In this case, the evidence was sufficient to support a conclusion that defendant's confession was the product of free will, and his incriminating statements were properly admitted as evidence. Lindsey v. State, 485 N.E.2d 102 (1985), 22 CLB 391.

§ 43.50 Fruit of an illegal arrest

U.S. Supreme Court After the defendant was found guilty in South Carolina state court of armed robbery, the intermediate appellate courts and the South Carolina Supreme Court affirmed, rejecting his argument that his confession should have been suppressed.

The Supreme Court vacated and remanded, holding that the fact that the confession may have been "voluntary," in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest. The Court explained that a finding of "voluntariness" for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. The Court thus remanded for further proceedings. Lanier v. South Carolina, 106 S. Ct. 297 (1985), 22 CLB 275.

VIOLATIONS OF *MIRANDA* STANDARDS AS GROUNDS FOR EXCLUSION

§ 43.60 Prerequisite of custodial interrogation

§ 43.70 —Lack of "interrogation" motive

Hawaii Defendant was convicted of murder. Initially, he was questioned only as a witness to the murder. Defendant voluntarily went to a police station to be interviewed. He denied involvement in the crime and voluntarily agreed to take a polygraph test. Defendant also signed a form stating that the administration of the polygraph was uncoerced, and that he un-

derstood that he had the right to remain silent. Defendant then took the test and "failed." He was then held for further questioning by the police. Defendant was again advised of his *Miranda* rights by the police, and he requested that an attorney be present during the interrogation. All questioning then ceased, and defendant was taken to a processing area to be booked, without counsel present. In the processing room was a police officer who was acquainted with defendant. This police officer did not know why defendant was in the station. When defendant entered the room, the police officer/acquaintance asked him what he was doing there, as a gesture of friendship and greeting. Defendant then told the police officer that he was being questioned as a witness to a murder. Without further word from the police officer, defendant then confessed to the officer that he had shot the murder victim. Defendant then told the police officer that he did not want an attorney and that he would tell the whole story to the police. The police officer then informed other officers of the defendant's confession. Another officer advised defendant of his right to counsel, but he said that he did not want an attorney, and wanted to make a statement. Before and during the course of an oral confession, defendant was twice more advised of his *Miranda* rights, but waived them. He then signed his statement, saying that he had voluntarily waived his right to have an attorney present. Defendant's confession was subsequently used as evidence against him at trial. On appeal, defendant claimed that he should have been allowed to suppress his confession, on the ground that it was elicited by interrogation after he invoked his right to counsel, in violation of his constitutional rights as articulated in *Miranda*.

The Hawaii Supreme Court affirmed the conviction. The relevant test as to whether a defendant was subject to interrogation is whether a police officer should have foreseen that his words and actions were reasonably likely to elicit an incriminating response from a defendant. The court held in this case that the police officer's question to the defendant about what had happened to him did not constitute interrogation, because the officer could not reasonably have known that this "greeting" would elicit an incriminating response from the defendant. Defendant's confession was therefore voluntary and uncoerced, and could be admitted as evidence. State v. Ikaika, 698 P.2d 281 (1985), 22 CLB 83.

§ 43.75 Necessity and sufficiency of warnings

§ 43.80 —Interpretations by state courts

New York Defendant was convicted of petit larceny and third-degree possession of stolen property. He was apprehended by a private detective in a department store with $175 worth of unpurchased shirts in a shopping bag. Defendant was taken by the security guard for questioning without being given *Miranda* rights, and he signed an inculpatory statement. Defendant was subsequently turned over to a special police officer, licensed by the Police Commissioner of the City of New York and employed by the store, who administered *Miranda* warnings, took defendant to the police station, and pressed charges against him. He was subsequently convicted of the charges. On appeal, defendant argued that his incriminating statement made to the private store detective should have been suppressed because of the involvement of the special detective in the proceedings.

The court of appeals held that the private store detective was not required to administer *Miranda* warnings to defendant before a special police officer arrested defendant and advised him of his rights. The court ruled that the employment of a special police officer by a store does not constitute state action, and, thus, the store does not have to follow legal guidelines pertaining to the issuance of *Miranda* warnings. The investigation conducted by the security guard who apprehended defendant was private in character and, as such, was not subject to the same rules as state action in regard to the interrogation of suspects. For state action to take place, official participation in an investigation must occur prior or simultaneous to the giving or signing of an inculpatory statement. In the present case, the special police officer did not enter case until after defendant signed and gave a "criminal trespass sheet" and a "circumstances sheet" to a private store detective. Thus,

defendant could not suppress his inculpatory statement. People v. Ray, 480 N.E.2d 1065 (1985), 22 CLB 173.

Virginia Defendant was convicted of five counts of capital murder. He was sentenced to death for each offense. After his arrest for one of the murders, defendant was read his *Miranda* rights, and asked if he understood them. He replied that he did. A detective then summarized the evidence against defendant and asked if he had anything to say. Defendant replied by asking if he had been told that he had the right to an attorney, and the detective responded in the affirmative. At that point, the detective and another detective present stood up, as if to cease questioning. Defendant then spontaneously referred to an automobile that the police claimed linked the defendant to the murder. The other detective then asked defendant if he killed the victim, and he answered "yes." Defendant thereupon confessed to the five murders of which he was subsequently convicted. On appeal, defendant argued, among other things, that his *Miranda* warning was insufficient, and that he should have had counsel appointed immediately after having been read his rights, and before he made a voluntary confession. Defendant contended that the oral *Miranda* warning was inadequate because the logical conclusion a defendant would draw was that he had to wait until the court appointed counsel for him, and that this would take some time. In essence, defendant argued that, effectively, he had not been told that he had the right to have an attorney appointed immediately, that is, before questioning.

The Virginia Supreme Court affirmed the convictions and the death sentence. The *Miranda* warning given defendant was not defective. *Miranda* requires that a defendant be told that he has the right to have an attorney present before any questioning, and if he cannot afford an attorney the court is empowered to appoint one for him. To add "prior to any questioning" to the latter part, as suggested by defendant is redundant. Taken as a whole, the meaning of the *Miranda* warning is clear; that is, that a defendant has the right to have counsel appointed prior to any questioning. The court ruled that "*Miranda* nowhere requires that a suspect be told he has the right to the immediate appointment of counsel. . . . The import of *Miranda* is that once a suspect asks for counsel, the police cannot interrogate him until counsel has been appointed." In this case, the interrogating detectives made motions to cease questioning defendant, whereupon he voluntarily made a statement about the crime and subsequently confessed to the murders. Poyner v. Commonwealth, 329 S.E.2d 815 (1985), 22 CLB 87.

§ 43.90 Waiver of *Miranda* rights

§ 43.95 —Voluntary and intelligent requirement

U.S. Supreme Court After his arrest in connection with breaking and entering, the defendant was questioned by police officers regarding a murder. The same evening, unknown to the defendant, the defendant's sister contacted the Public Defender's Office, and an attorney from that office was told that the defendant would not be questioned until the following day. Less than an hour later, the police gave the defendant his *Miranda* warnings and he signed a waiver. The Rhode Island state court denied his pretrial motion to suppress his statements, and he was convicted of first-degree murder. The district court denied habeas corpus relief, but the court of appeals reversed.

The Supreme Court reversed, holding that the police's failure to inform the defendant of the attorney's telephone call did not deprive him of information essential to his ability to knowingly waive his Fifth Amendment rights. The court reasoned that events occurring that are unknown to the defendant have no bearing on his capacity to knowingly waive his rights. Moran v. Burbine, 106 S. Ct. 1135 (1986), 22 CLB 477.

§ 43.100 —Effect of refusal to sign written waiver

Court of Appeals, 9th Cir. After his conviction for conspiracy to distribute cocaine, defendant appealed, arguing that his due process rights had been violated at trial when an F.B.I. agent was permitted to testify as to his refusal to sign a *Miranda*-waiver form.

The Court of Appeals for the Ninth Circuit affirmed the conviction, holding that while the trial court erred in permitting

testimony regarding defendant's refusal to sign a *Miranda*-waiver form, the error was harmless in light of the extremely strong case against defendant. The court reasoned that declining to sign a waiver form is equivalent to an assertion of the right to silence, and that evidence of defendant's assertion of the right to silence must not be brought before the jury since it would create a "strong negative inference" that the defendant is guilty. United States v. Valencia, 773 F.2d 1037 (1985), 22 CLB 167.

§ 43.105. —Effect of request for counsel

U.S. Supreme Court After having been arraigned in Michigan state court on unrelated murder charges, the defendants requested the appointment of counsel. Before having had an opportunity to consult with counsel, the defendants were questioned by police officers after having been advised of their *Miranda* rights. The defendants were both convicted at trial over objections to the admission of their confessions in evidence. The Michigan Court of Appeals reversed and remanded in one case, but affirmed in the other, and the Michigan state court affirmed.

The Supreme Court affirmed, holding that once a suspect has invoked his right to counsel, either at an arraignment or similar proceeding, any waiver of the defendant's right to counsel for a police-initiated interrogation is invalid. The Court reasoned that the assertion of the right to counsel at an arraignment is no less significant than when it is made during a custodial interrogation. Thus, after a formal accusation has been made, the police may no longer employ techniques for eliciting information from uncounseled defendants that might have been entirely proper at an earlier stage of the investigation. Michigan v. Jackson, 106 S. Ct. 1404 (1986), 22 CLB 475.

Court of Appeals, 1st Cir. After the defendant was convicted in district court on narcotics charges, the Court of Appeals for the First Circuit affirmed in part, vacated in part, and remanded.

On a petition for rehearing, the First Circuit denied the petition, holding that where the words and actions of the accused are ambiguous as to whether he wishes a lawyer, the questioning officers must find out more specifically whether he wants a lawyer before they can proceed with other questioning. The court further commented that, based on the record in this case, the questioning was impermissible even under a standard that restricts questioning to clarify the ambiguous request for counsel. United States v. Porter, 776 F.2d 370 (1985), 22 CLB 282.

44. CONFRONTATION OF WITNESSES

§ 44.00 In general

§ 44.05 —Interpretations by state courts

Illinois Defendant was convicted of murder and armed robbery. His conviction was overturned on grounds unrelated to the present appeal, and the case was remanded. At trial, a juvenile witness testified that he saw defendant commit the crimes with which he was charged. The witness, 11 years old at the time of the crimes, was questioned by police the day after the murder, when he went to the crime scene and was asked by the police if he knew anything about it. The police told him that he would go to jail if he did not tell them what he knew about the crimes. He thereupon said that the crimes were committed by "Eddie," which is not defendant's name, and was taken to police headquarters, where he identified defendant from photographs shown to him by the police.

At the time of defendant's retrial—the subject of the present appeal—the juvenile witness was in the custody of the Department of Corrections. His custodial status was the result of an adjudication of delinquency, arising from a burglary charge filed against him. In addition, ten other petitions were filed against the juvenile witness, two of which resulted in adjudication of delinquency. At defendant's retrial, when the juvenile witness testified, he was subject to reinstatement of the unadjudicated petitions. At the retrial, defendant's counsel attempted to cross-examine the juvenile witness about these juvenile delinquency petitions to establish a possible bias or motive for the witness's testimony, but counsel was prevented from doing so by the trial court. On appeal, defendant argued that he was denied his Sixth Amendment right to confront a witness

against him, when the trial court refused to allow defense counsel to cross-examine the juvenile witness about any possible interest or bias in his testimony and about the fact that the witness was in the custody of the Department of Corrections.

The Illinois Supreme Court held that the trial court's refusal to allow defendant's counsel to cross-examine the juvenile witness about the petitions filed against him, and the fact that he was under custodial status, was a denial of defendant's right to confront his accuser and was, as such, a constitutional error of first magnitude and no amount of showing of want of prejudice could cure it. A defendant's right to confront a witness includes the right to cross-examine the accuser as to any possible ulterior motives, even if the witness is a juvenile, when defendant's liberty is at stake and the credibility of the witness is in question. Accordingly, the court reversed defendant's conviction and remanded the case for a new trial. People v. Triplett, 485 N.E.2d 9 (1985), 22 CLB 393.

§ 44.15 Co-defendant's out-of-court statements

U.S. Supreme Court At defendant's trial for conspiring to manufacture and distribute illegal drugs, a taped conversation was introduced between various participants in the conspiracy. The defendant objected on the grounds that the voices of unindicted co-conspirators on the tape were inadmissible, absent a showing that the declarants were unavailable. The court of appeals reversed his conviction.

The Supreme Court reversed, holding that the Confrontation Clause does not require a showing of unavailability as a condition to the admission of the out-of-court statements of a nontestifying co-conspirator. The Court observed that the principles whereby prior testimony may be admitted as a substitute for live testimony only if the declarant is unavailable do not apply to co-conspirator statements. United States v. Inadi, 106 S. Ct. 1121 (1986), 22 CLB 477.

§ 44.20 —Admission subject to limiting instructions

U.S. Supreme Court At a Tennessee state court murder trial, the State introduced a confession made by defendant. Defendant then testified that his confession was coercively derived from an accomplice's written confession, claiming that the police officer read the accomplice's confession and directed defendant to say the same thing. In rebuttal, the police officer denied that defendant was read the accomplice's confession, which was read to the jury after the trial judge instructed them that it was admitted solely for rebuttal purposes. After defendant was convicted and sentenced to life imprisonment, the Tennessee Court of Criminal Appeals reversed.

The Supreme Court reversed, holding that the defendant's confrontation rights under the Sixth Amendment were not violated by the introduction of the accomplice's confession for rebuttal purposes. The Court explained that since the accomplice's testimony was not introduced to prove what happened at the murder when the defendant confessed, no Confrontation Clause concerns were raised. Tennessee v. Street, 105 S. Ct. 2078 (1985), 22 CLB 70.

§ 44.25 —Limitations on right to cross-examine

U.S. Supreme Court After the defendant was convicted of murder in Delaware state court, his conviction was reversed in the Delaware Supreme Court on the ground that the admission of an expert witness's opinion violated the defendant's Sixth Amendment right to confrontation because the witness could not recall the basis for his opinion. At trial, the prosecution sought to prove that the defendant killed the victim with a cat leash. To establish this, the prosecution sought to establish that a hair found on the leash was that of the victim, and an FBI agent testified that the hair had been forcibly removed, but he failed to recall how he arrived at that opinion.

The Supreme Court reversed, holding that the defendant's confrontation rights had not been denied, since, through its own witness, the defense was able to suggest to the jury that the witness had relied on a theory that the defense expert considered baseless. Delaware v. Fensterer, 106 S. Ct. 292 (1985), 22 CLB 275.

U.S. Supreme Court During the defendant's murder trial, the Delaware trial

court refused to allow defense counsel to cross-examine a prosecution witness about an agreement that he had made to speak to the prosecutor about the murder in question in exchange for the dismissal of pending public drunkenness charges against him. After the defendant was convicted, the Delaware Supreme Court reversed, holding that the court improperly restricted cross-examination and that the harmless error doctrine did not apply to such a ruling.

The Supreme Court vacated and remanded, holding that although the trial court's denial of the right to impeach the prosecution witness for bias violated the defendant's rights under the Confrontation Clause, such a ruling was subject to harmless error analysis. The Court reasoned that the correct inquiry should have been whether, assuming the damaging potential of the cross-examination were fully realized, a reviewing court would nevertheless say that the error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 106 S. Ct. 1431 (1986), 22 CLB 475.

Court of Appeals, 1st Cir. After defendant was convicted in the district court of bank robbery, he appealed on the ground that his Sixth Amendment rights were infringed by the trial court's restriction of his cross-examination of an accomplice-witness.

The Court of Appeals for the First Circuit affirmed, holding that the district court's refusal to permit cross-examination of an accomplice-witness as to unprosecuted crimes and a pending murder charge was not improper. The court explained that defense counsel had already established, through extensive cross-examination, the potential bias of the accomplice, stemming both from his plea agreement and his expectation and hope for leniency. The court thus concluded that little, if anything, would have been added by admitting testimony as to unprosecuted crimes. United States v. Barrett, 766 F.2d 609 (1985), 22 CLB 73.

45. RIGHT TO COUNSEL

SCOPE AND EXTENT OF RIGHT GENERALLY

§ 45.05 Right of indigent defendant

California Defendant was convicted of second-degree murder for the shooting death of a man outside a tavern. He was sentenced to seventeen years to life in prison. While incarcerated for the crime, defendant was sued by the son of the murdered man for wrongful death. Defendant claimed that he was indigent, and requested that the court appoint counsel to represent him. The court declined his request on the ground that defendant was not entitled to court-appointed counsel in a civil suit. In addition, the Superior Court (Napa County) claimed that the state legislature had not appropriated money for the compensation of court-appointed counsel in civil actions. Defendant thereupon sought a writ of mandate to compel the court to appoint counsel to defend him and to provide reasonable compensation to such counsel.

The California Supreme Court held that defendant had a right to access to the courts. As a last resort, in an appropriate case, court appointment of counsel may be the only way to provide an incarcerated, indigent defendant in a civil suit with access to the courts for the protection of his personal and property rights. Access, though, not the right to counsel, is the important point; and, the power to appoint counsel is independent of the power to compensate such counsel. The court declined to rule, however, on whether such counsel should be appointed by the trial court, and how such counsel should be compensated. The court decided that the trial court should conduct further proceedings on those matters. Yarbrough v. Superior Court (County of Napa), 702 P.2d 583 (1985), 22 CLB 177.

Maine Defendant petitioned for a post-conviction review of a court order committing him to jail for the non-payment of a fine imposed on him after his conviction of operating a motor vehicle with a suspended driver's license. Defendant argued that he was denied his due process rights because the court failed to appoint counsel for him at his hearing to show cause why he should not be imprisoned for not paying the previously imposed fine. Defendant alleges that the Fourteenth Amendment of the U.S. Constitution and the Maine Constitution require that an indigent defendant has a right to court-appointed counsel in a

Section 1304 hearing made necessary by his failure to pay a fine.

The Supreme Judicial Court of Maine held that defendant did not have the right to court-appointed counsel. Defendant had already been convicted of a crime, and the risk of improper incarceration due to a lack of counsel was minimal. The court cautioned, however, that it did not mean to say that court-appointed counsel will never be required in a Section 1304 hearing. Rather, the simple procedures and issues involved in such a hearing will normally make such counsel unnecessary. Colson v. State, 498 A.2d 585 (1985), 22 CLB 292.

§ 45.25 Waiver

Delaware Defendant was convicted of first-degree felony murder and possession of a deadly weapon during commission of a felony. The murder, the shooting of a clerk, took place during the course of a burglary of a liquor store. A co-defendant was also convicted of the same offenses. It was a statement of the co-defendant that initially led to defendant's arrest. After his arrest in Maryland, defendant was extradited to Delaware, where the crimes occurred. Upon his arrival in Delaware, defendant was advised of the charges against him and of his *Miranda* rights, and he invoked his right to counsel. All questioning thereupon ceased, but before defendant was taken to a processing room, a detective told him that he was being charged as a result of the statement made by the co-defendant implicating the defendant in the incident and naming defendant as the triggerman. After processing, defendant was given something to eat and placed in a cell. Shortly thereafter, defendant was taken from his cell to Magistrate Court. As the defendant and the detective arrived at the court, defendant made a spontaneous statement denying that he shot the victim but, in effect, implicating himself in the crimes. The detective informed defendant that since he had invoked his right to counsel, the detective could not discuss the case with him. Defendant then asked the detective if he could retract his request for counsel, and the detective told defendant that he would call the district attorney and a defense attorney so that defendant could tell his story. The detective was unsuccessful in attempting to reach a deputy attorney general, and he did not attempt to contact a defense attorney. The detective thereupon asked defendant if he wanted to tell the detective what happened. Defendant then made a second statement that placed him at the scene of the crimes but denied participation in the criminal acts themselves. At a suppression hearing, defendant did not contest the admissibility of the first, spontaneous statement, but challenged the admissibility of his second statement, charging a violation of his Fifth Amendment rights. The state, citing Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830 (1983), argued that defendant's second statement, made as he arrived at Magistrate Court, constituted initiation of further communication with the police and a valid waiver of his right to counsel, and was, therefore, admissible. The trial court admitted the statements, and these statements were used to convict defendant.

The Delaware Supreme Court held that the detective's recitation of the evidence against defendant after he had invoked his rights to silence and counsel was reasonably calculated to elicit an incriminating statement from the defendant, and thus tainted defendant's subsequent waiver of these same rights. The court cited Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981), which established that statements made after invocation of the Fifth Amendment are only admissible if the prosecution proves that the accused initiated further contact with the police and thus validly waived his previously invoked right to counsel. The court stated that "for present purposes the controlling principle is clear: If the police initiate further questioning after an accused requests the presence of counsel, resulting statements are excludable apart from the issue of waiver." In this case, there was no doubt that the defendant requested counsel; therefore, the issue hinges on who initiated further communication. The court ruled that the fact that defendant's second incriminating statement occurred approximately forty-five minutes after the detective had ceased questioning defendant was irrelevant. The detective should not have repeated to defendant that a co-defendant had named him as the prime culprit, and these statements to defendant by the detective established further contact on the

part of the police. The court stated that "In going beyond the formalities of the booking process to describe State's evidence, particularly the highly incriminating accusations of . . . [co-defendant, the] Detective . . . engaged in a gratuitous and totally unnecessary tactic which was reasonably calculated to elicit a reaction from the defendant." Since the defendant's statement was elicited after he invoked his right to counsel, it should not have been admitted into evidence. Thus, the court reversed defendant's conviction and remanded the case for a new trial. Wainwright v. State, 504 A.2d 1096 (1986), 22 CLB 487.

North Carolina Defendant was convicted of two counts of first-degree murder in North Carolina. He was indicted for the crimes after questioning in Georgia by North Carolina authorities. Defendant was in Georgia under sentence for a different murder committed in that state. During custodial interrogation in Georgia for the murder committed in that state, defendant invoked his Fifth and Sixth Amendment rights. The North Carolina law enforcement officials subsequently went to Georgia to question defendant about the murders in North Carolina. They advised defendant of his constitutional rights, but he waived them, and made an inculpatory statement about the crimes, which confession was later entered into evidence at trial and used to convict defendant. On appeal, defendant argued that his statements made to the North Carolina auhorities should have been suppressed, even though he waived his rights, because he had earlier invoked them in regard to the Georgia crime.

The North Carolina Supreme Court found no error and thereby affirmed defendant's conviction. It was constitutionally permissible for the North Carolina officers to question defendant about the murders committed in that state, because he waived his rights in that regard even though defendant had previously invoked his rights to remain silent and to have counsel present during custodial interrogation by the Georgia officials about unrelated crimes committed in that state. State v. Dampier, 333 S.E.2d 230 (1985), 22 CLB 178.

§ 45.30 —Right to defend pro se

Connecticut Defendant was convicted of tampering with a witness. At trial, defendant appeared *pro se*. Although he applied for and was found eligible to receive a public defender, he expressed an interest in participating in his own defense. Defendant initially asked that an attorney appear as co-counsel with him, but the public defender assigned to him told the trial court that she [the public defender] could not do so. The public defender suggested to defendant that he appear *pro se*, and told him that she would move to withdraw her appearance on his behalf if he so wished. She also offered to appear as defendant's standby counsel if he decided to proceed *pro se*. The trial court next warned defendant of the dangers of appearing *pro se*, but he responded that his counsel was not going to argue his case the way he wanted. The public defender then repeated her motion to withdraw from the case. The court repeated its warning to defendant of the dangers of self-representation, and he offered an ambiguous reply as to his wishes. The court next instructed the clerk to ensure that defendant was given a *pro se* appearance form. The public defender asked that defendant be given some time to decide, but defendant answered that he would appear *pro se*. He filed the necessary form, and the court granted the public defender's motion to withdraw her appearance. The court, however, appointed the public defender as standby counsel for the defendant. The trial then began. Just before the presentation of evidence, defendant moved to dismiss the charges against him. During a hearing on this motion, defendant requested that counsel be reappointed and his *pro se* appearance withdrawn. This request was granted. Later in the trial, defendant again changed his mind and requested that he be allowed to represent himself. The public defender was again withdrawn, and defendant conducted the rest of his trial on a *pro se* basis. He was subsequently convicted of the charge against him. On appeal, defendant argued that he did not waive his right to counsel.

The Connecticut Supreme Court held that defendant made a valid and effective waiver of his constitutional right to counsel. The court stated that "we conclude that the defendant did voluntarily and intelligently waive his constitutional right to

counsel in choosing the option of proceeding *pro se* with standby counsel available to him." State v. Getters, 497 A.2d 408 (1985), 22 CLB 284.

TYPE OR STAGE OF PROCEEDING

§ 45.45 Arraignment and preliminary hearing

Court of Appeals, 4th Cir. A petition for a writ of habeas corpus was filed in the district court, alleging that the defendant's counsel was inadequate in Virginia state court in connection with a guilty plea to a charge of raping an 11-year-old girl.

The Court of Appeals for the Fourth Circuit reversed, holding that a defendant is not denied his Sixth Amendment right to counsel merely because his lawyer did not pursue every avenue of investigation open to him. The court noted that defense counsel was fully aware of the defendant's history and mental limitations because of his prior representation of him, and that counsel knew the defendant had no alibi for the time period of the alleged rape and that the defendant had, in fact, admitted being with the victim at the time in question. Moreover, defense counsel had reason to believe that a guilty plea, combined with a favorable psychiatric evaluation, raised the likelihood of a sentence of probation. Ballou v. Booker, 777 F.2d 910 (1985), 22 CLB 279.

Court of Appeals, 5th Cir. After the defendant was convicted in the district court of first-degree murder, he appealed on the grounds, among other things, that he was denied his right to counsel before he confessed to the murder.

The Court of Appeals for the Fifth Circuit affirmed, holding that the defendant did not have any Sixth Amendment right to counsel at the time of his confession because no adversary judicial proceedings had commenced against him in regard to the murder. The court commented that adversary judicial proceedings may be initiated by way of "formal charge, preliminary hearing, indictment, information or arraignment." United States v. McClure, 786 F.2d 1286 (1986), 22 CLB 480.

ADEQUACY AND EFFECTIVENESS OF COUNSEL

§ 45.110 Ineffectiveness

U.S. Supreme Court After telling his defense counsel that he had not seen anything in the victim's hand when he stabbed the victim, defendant changed his story and told counsel that he had seen "something metallic" in the victim's hand. When counsel warned that he would seek to withdraw from representation if the defendant insisted on committing perjury, the defendant ultimately testified as originally planned. The jury found him guilty, and the defendant moved for a new trial. His motion was denied, and the Iowa Supreme Court affirmed. Habeas corpus relief was denied in the district court, but the Court of Appeals for the Eighth Circuit reversed.

The Supreme Court reversed, holding that the right to effective assistance of counsel is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at trial. The Court observed that while counsel must take all reasonable lawful means to obtain his client's objectives, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. Nix v. Whiteside, 106 S. Ct. 988 (1986), 22 CLB 380.

Court of Appeals, 4th Cir. After the defendant was convicted in South Carolina state court for rape, his petition for habeas corpus was denied in the district court. The defendant claimed that he had been denied effective assistance of counsel, since his court-appointed counsel had only been given three days to prepare for trial.

The Court of Appeals for the Fourth Circuit affirmed, finding that the facts and circumstances surrounding the defendant's representation by appointed counsel did not amount to ineffective assistance. The court noted that while counsel only had three days to prepare between indictment and trial, the appointed counsel had previously represented the defendant for more than two months prior to a preliminary hearing and had conducted necessary interviews and reviewed the prosecutor's file. Moreover, counsel participated in all critical stages of the trial and defense counsel had complete access to evidence and witnesses. Griffen v. Aiken, 775 F.2d 1226 (1985), 22 CLB 278.

§ 45.115 —Interpretations by state courts

Idaho Defendant was convicted of voluntary manslaughter for the shooting death of a man who also wielded a firearm. After his arrest, defendant was interrogated by a prosecutor and a deputy sheriff. Defendant asked the prosecutor if he was an attorney and if the prosecutor could represent him, not understanding the prosecutor's position. At trial, defendant pled self-defense, claiming that he shot the deceased when the other man lifted his gun as if to shoot defendant. The deputy sheriff, though, testified that defendant told him during the interrogation that the deceased had dropped his gun and was, thus, unarmed, when defendant fired the final, deadly shots. Defendant's counsel failed to object to the deputy sheriff's testimony during the trial. On appeal, defendant argued that the failure of his attorney to object to the deputy sheriff's testimony amounted to ineffective counsel. In addition, defendant argued that his statements made during interrogation should have been suppressed, since he had requested counsel before he made the inculpatory remarks and had been denied same.

The Idaho Supreme Court reversed defendant's conviction and remanded the case on the ground that defendant was denied his Fifth and Sixth Amendment rights. The court asserted that counsel's failure to move for a suppression of the deputy sheriff's testimony constituted an objectively verifiable attorney error, in that it precluded defendant from arguing that the use of deadly force was justified self-defense. In addition, although defendant never specifically said that he wished to receive counsel, his question to the prosecutor whether the prosecutor could represent defendant was at least equivocally a request for counsel. Thus, the conviction should be vacated, and the case remanded. Carter v. State, 702 P.2d 826 (1985), 22 CLB 179.

§ 45.120 —Failure to assert available defense

Court of Appeals, 3d Cir. A Pennsylvania inmate convicted of murder filed a petition for habeas corpus, claiming that he had been denied effective assistance of counsel. The district court originally granted the writ, but it later reversed itself and vacated its previous order.

The Court of Appeals for the Third Circuit affirmed, holding that counsel's mistakes did not render ineffective his representation of the defendant. Specifically, counsel had failed (1) to inform the jury that the murder victim had been previously convicted of aggravated assault and (2) to submit any requests to charge on the theory of voluntary manslaughter. McNeil v. Cuyler, 782 F.2d 442 (1986), 22 CLB 385.

Court of Appeals, 5th Cir. After defendant was arrested and convicted of aggravated robbery, he appealed on the ground that his trial counsel failed to raise a Fourth Amendment objection to the introduction of the victim's wallet.

The Court of Appeals for the Fifth Circuit affirmed, holding that no warrant was required prior to the police officer's search of the defendant's personal property envelope at the county jail. The court noted that once the accused was in lawful custody, his personal effects were subject to search and seizure without a warrant. The court then concluded that since there was no expectation of privacy as to the wallet, counsel was not negligent in failing to challenge its introduction. Lockhart v. McCotter, 782 F.2d 1275 (1986), 22 CLB 383.

California Defendant was convicted of first-degree murder and sentenced to death, in a retrial of his case. At retrial, defendant expressed to his counsel a desire to present a diminished capacity defense, due to habitual use of the drug phencyclidine (PCP), or "angel dust," at the guilt/special circumstances phase of the trial. Defense counsel refused to do so, and offered no defense at that stage of the trial. Instead, counsel presented a diminished capacity defense at the sentencing phase after defendant's conviction, in the hope of avoiding the imposition of the death penalty, which was imposed nonetheless. On automatic appeal of the death sentence, defendant argued that the trial court erred in allowing counsel to overrule defendant's clearly expressed desire to present a defense to the charged special circumstances.

The California Supreme Court held that defendant's counsel did not have the authority to refuse defendant's expressed desire to present a diminished capacity defense at the guilt/special circumstances

phase of the trial. The court stated that "the principal issue is whether a defense counsel's traditional power to control the conduct of a case includes the authority to withhold the presentation of any defense at the guilt/special circumstances stage of a capital case, in the face of a defendant's openly expressed desire to present a defense at that stage and despite the existence of some credible evidence to support the defense." In that regard, the court ruled that "given the magnitude of the consequences that flowed from the decision whether or not to present any defense at the guilt/special circumstances phase, we do not think counsel could properly refuse to honor defendant's clearly expressed desire to present a defense at that stage." Further, "in light of the above conclusion, it is clear that in this case both defense counsel and the trial court misjudged the scope of the attorney's authority to override defendant's express wishes on a matter of fundamental importance." People v. Frierson, 705 P.2d 396 (1985), 22 CLB 287.

§ 45.125 —Incorrect legal advice

U.S. Supreme Court After the defendant entered a guilty plea to first-degree murder and theft charges in Arkansas state court, he was sentenced to concurrent terms of thirty-five years for the murder and ten years for the theft. The defendant then filed a habeas corpus petition, alleging that his plea was involuntary by reason of ineffective assistance of counsel because his court-appointed attorney has misinformed him that he would be eligible for parole after serving one third of his prison sentence. The district court denied relief and the court of appeals affirmed.

The Supreme Court affirmed, holding that where a defendant enters a guilty plea on counsel's advice, a claim of ineffective assistance of counsel requires that the defendant show that counsel's representation fell below an objective standard of reasonableness and that there was "prejudice," that is, a reasonable probability that the outcome would have been different but for counsel's errors. The Court concluded that there was no claim of "prejudice" here because there was nothing to support the conclusion that parole eligibility played a role in the defendant's decision to plead guilty. Hill v. Lockhart, 106 S. Ct. 366 (1985), 22 CLB 276.

CONFLICT OF INTEREST

§ 45.145 In general

Court of Appeals, 4th Cir. After the defendants were convicted in the district court on RICO, conspiracy, and Travel Act violations, they appealed on the ground that an assistant district attorney's participation in the case was improper, since he had formerly represented them in connection with the same matter.

The Court of Appeals for the Fourth Circuit affirmed in part and reversed in part, holding that the prosecutor's participation in the case was per se illegal, and that the defendants' right to a fair trial was fatally compromised, especially since he had represented them as to a matter identical to the one on trial. United States v. Schell, 775 F.2d 559 (1985), 22 CLB 282.

§ 45.160 Previous representation of prosecution witness

Court of Appeals, 2d Cir. After defendants were convicted on racketeering charges, they appealed on the ground, among others, that their right to counsel was infringed by a defense lawyer's representation of a government witness seven years earlier.

The Court of Appeals for the Second Circuit affirmed, holding that the defendants' rights to conflict-free counsel were not impaired by the attorney's prior representation, since the prior representation was entirely unrelated to the present prosecution; the attorney subjected the witness to a "disastrous" cross-examination; and the trial court carefully informed the jury regarding the prior representation. United States v. Paone, 782 F.2d 386 (1986), 22 CLB 384.

46. CRUEL AND UNUSUAL PUNISHMENT

§ 46.00 In general

U.S. Supreme Court During the course of a riot at Oregon State Penitentiary, an officer shot respondent in the knee. The respondent then brought a civil rights action (42 U.S.C. § 1983) alleging that he had

been deprived of his rights under the Eighth and Fourteenth Amendments. The district court directed a verdict for petitioners, but the court of appeals reversed and remanded.

The Supreme Court reversed, holding that the shooting of an inmate during a security action does not violate his Eighth Amendment right to be free from cruel and unusual punishment as long as the inflicting of pain was not done wantonly or unreasonably. The Court added that the test as to whether the force was reasonable or not was whether force was applied in a good-faith effort to maintain or restore discipline, or whether it was applied maliciously and sadistically for the purpose of causing harm. Whitley v. Albers, 106 S. Ct. 1078 (1986), 22 CLB 478.

Court of Appeals, 5th Cir. A prison inmate brought a civil rights action against prison guards, the prison warden, and others for damages for injuries sustained in beating and stabbing incidents. The prisoner claimed that he was deprived of his civil rights by being jailed with an inmate with known animosity toward him. The district court granted damages, and the defendants appealed.

The Court of Appeals for the Fifth Circuit affirmed in part and reversed in part, holding that the conduct of the prison officials did not violate the Eighth Amendment prohibition against cruel and unusual punishment, since it did not manifest a conscious or callous indifference to the prisoner's needs. Johnston v. Lucas, 786 F.2d 1254 (1986), 22 CLB 479.

§ 46.01 —Interpretations by state courts

Delaware Defendant was convicted of first-degree murder, first-degree rape, and first-degree burglary. He was sentenced to death. The murder victim was a 92-year-old woman weighing seventy-five pounds. Defendant murdered the victim, after breaking into her home, by choking her in the course of raping her. On appeal, defendant argued, among other things, that the death penalty was cruel and unusual punishment, and thus unconstitutional, for someone who had no proven intent to cause a victim's death.

The Delaware Supreme Court vacated the death sentence and remanded the case for a new penalty hearing, but on other grounds than the appeal issue raised here. On the above question, the court held that imposition of the death penalty for felony murder is not per se unconstitutional. The court stated that "the death penalty is not a grossly disproportionate and excessive punishment for a defendant found guilty of felony murder, who actually killed his victim under the circumstances present here." Defendant strangled a frail old woman while raping her, which defendant should have known could cause her death. His conduct therefore fulfilled a statutory requirement of recklessness and met a constitutional standard of culpability. According to the court, "an individual's culpability is determined by reference to his intentions, expectations and actions." The court ruled that in this case, defendant in a sense acted intentionally, in that his actions can reasonably have been expected to result in the death of his victim. At any rate, the felony-murder statute does not require any showing that a defendant intended to kill his victim, but only that his actions recklessly caused the victim's death. Under a Delaware statute, a presumption exists that a person intends the natural and probable consequences of his actions. In this case, the natural and probable consequence of defendant's action was his victim's death. Whalen v. State, 492 A.2d 552 (1985), 22 CLB 85.

§ 46.05 Death penalty

Court of Appeals, 4th Cir. A habeas corpus proceeding was brought to challenge the death sentence imposed in South Carolina state court for murder and armed robbery.

The Court of Appeals for the Fourth Circuit vacated the sentence and remanded, holding that the trial court's instructions were erroneous, since the jury could reasonably have concluded that it could recommend a death sentence even if it found that the defendant was not personally responsible for the murder, but was only responsible as an aider and abetter. The court noted that in South Carolina, malice is an element of murder, and that general instructions as to the burden of proof and the presumption of innocence could not remedy the error. Hyman v. Aiken, 777 F.2d 938 (1985), 22 CLB 279.

§ 46.10 —Statutory requirements

U.S. Supreme Court After defendant was convicted of murder and sentenced to death, the Court of Appeals for the Fifth Circuit reversed the district court, granted his habeas corpus petition, and vacated the death sentence. However, the court permitted the state, at its option, either to impose a life sentence or to conduct a new sentence hearing at which, with the proper findings, a death sentence could be reimposed.

The Supreme Court modified and remanded, holding that while the court of appeals was correct in concluding that neither the jury's verdict of guilt nor its imposition of the death sentence necessarily reflected a finding of intent on the part of the defendant, the court erred in ordering a new sentencing hearing without determining whether the necessary finding of intent had been made by the state court. The Court reasoned that a court's review of sentencing procedures cannot be limited to an examination of jury instructions. Rather, the court must examine the entire course of the state's proceedings. Cabana v. Bullock, 106 S. Ct. 689 (1986), 22 CLB 379.

Florida Defendant was convicted of kidnapping and first-degree murder and sentenced to death. The death penalty was imposed because it was found that the crime involved aggravating circumstances, in that (1) the murder was especially heinous, atrocious, or cruel and (2) the crime was committed while defendant was under sentence of imprisonment imposed for a previous conviction of another capital felony. On appeal, defendant argued that there was insufficient evidence that these aggravating circumstances existed.

The Florida Supreme Court ruled that it was not adequately established that the crime was especially heinous, atrocious, or cruel. According to the court, "heinous" is defined as "extremely wicked or shockingly evil," "atrocious" as "outrageously wicked and vile," and "cruel" means "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." In this case, there was no proof that the murder fell into any of these categories. No specific cause of death could be ascertained from the autopsy—there was no clear evidence that the victim struggled with defendant before her death—and it could not be determined whether the victim was sexually assaulted before her murder, due to the deteriorated state of the body when it was discovered. Thus, it could not be determined that the crime was especially heinous, atrocious, or cruel. The court ruled, however, that the second aggravating circumstance—that the crime was committed while defendant was under sentence of imprisonment for another capital felony—existed. It was proved that defendant had escaped from jail in Colorado and committed the murder in question while under sentence in that state for aggravated kidnapping, a crime which involved the use of, or threat of, violence. Thus, the imposition of the death penalty on defendant in this case was justified. Bundy v. State, 471 So. 2d 9 (1985), 22 CLB 170.

47. DOUBLE JEOPARDY

§ 47.00 In general

U.S. Supreme Court After defendant pleaded guilty to aggravated robbery, he was indicted for aggravated murder based on the bank robbery. He was found guilty at trial. The Ohio Court of Appeals, finding that the murder conviction was barred by double jeopardy, modified the conviction to that of the lesser included offense of murder. After the Ohio Supreme Court denied his appeal, his petition for a writ of habeas corpus was denied in the district court. The Court of Appeals for the Sixth Circuit reversed.

The Supreme Court reversed, holding that reducing defendant's concededly jeopardy-barred conviction for aggravated murder to a conviction for murder that concededly was not jeopardy-barred was an adequate remedy for the double jeopardy violation. The Court noted that when such a jeopardy-barred offense is reduced to a lesser charge, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-barred offense. Morris v. Matthews, 106 S. Ct. 1032 (1986), 22 CLB 381.

§ 47.05 —Interpretations by state courts

Hawaii Defendant pleaded guilty to three counts of promoting a dangerous drug in the second degree. He was sentenced on October 27, 1983 to ten years' imprisonment and was also ordered to make restitution. At the time of sentencing, a motion to sentence defendant as a repeat offender filed by the state was pending before the trial court, but the motion was continued to November 2, 1983, to comply with certain notice requirements. On November 2, the trial court granted the state's motion upon finding that defendant was a repeat offender under the state statute. The ten-year sentence defendant received on October 27 was amended to include a five-year mandatory minimum term of imprisonment. On appeal, defendant argued that the court, by granting the motion, increased the severity of punishment after the October 27 sentencing, thereby violating the double jeopardy clause of the Fifth Amendment.

The Hawaii Supreme Court affirmed the sentencing by holding that where subsequent to sentencing it became evident that defendant was a repeat offender, the trial court was duty-bound to correct an illegal sentence and impose the five-year minimum term of imprisonment mandated by state statute. The court recognized that the power to correct even a statutorily illegal sentence must be subject to some temporal limit, but only five days elapsed when the illegal sentence was corrected by the trial court. State v. Delmondo, 696 P.2d 344 (1985), 22 CLB 294.

§ 47.30 Crimes against separate sovereignties

§ 47.35 —Dual sovereignty doctrine

U.S. Supreme Court The defendant hired two men to murder his wife, and the men kidnapped the wife from their home in Alabama. Her body was later found at the side of a road in Georgia. The defendant pleaded guilty to "malice" murder in Georgia state court in exchange for a life sentence. Subsequently, he was tried and convicted of murder in Alabama state court and was sentenced to death. The Alabama appellate court and Alabama Supreme Court affirmed the conviction.

The Supreme Court affirmed, holding that under the dual sovereignty doctrine, successive prosecutions by two states for the same conduct are not barred by the double jeopardy clause. The Court thus held that the Alabama prosecution was not barred because each state's power to prosecute derives from its inherent sovereignty, and not from the federal government. Heath v. Alabama, 106 S. Ct. 433 (1985), 22 CLB 277.

§ 47.45 Separate and distinct offenses

U.S. Supreme Court After defendant was convicted in the district court of continuing criminal enterprise (CCE), conspiracy to possess marijuana, and other related offenses, he appealed on double jeopardy grounds. The Court of Appeals for the Eleventh Circuit affirmed in part.

The Supreme Court affirmed, holding that prosecution for CCE and marijuana importation did not violate the double jeopardy clause; nor did it bar cumulative punishment for those two offenses. The Court pointed out that the language, structure, and legislative history of the Comprehensive Drug Act of 1970 indicate that the CCE offense is a separate offense that is punishable in addition to the predicate offenses. Garrett v. United States, 105 S. Ct. 2407 (1985), 22 CLB 72.

Court of Appeals, 2d Cir. An interlocutory appeal was taken from an order of the district court denying a motion to dismiss pending criminal RICO charges on the grounds that prosecution was barred by the Double Jeopardy Clause and prior plea agreements. Defendants were facing RICO charges arising out of their alleged membership in the Colombo organized crime family. One of the predicate offenses for the RICO charges related to the bribery of an IRS Special Agent, who pretended to be amenable to corrupt overtures. Each of the defendants had previously pled guilty to these bribery charges.

The Court of Appeals for the Second Circuit affirmed, holding that the Double Jeopardy Clause and the prior guilty pleas were not a bar to a trial on the pending RICO charges. The court noted that the RICO conspiracy continued for four years beyond the date of the last indictment in the bribery case, and the plea agreement made by one U.S. attorney did not bind another U.S. attorney in a different district. United States v. Persico, 774 F.2d 30 (1985), 22 CLB 160.

§ 47.55 Administrative proceedings

Court of Appeals, 4th Cir. A state administrative hearing resulted in the determination that defendants fraudulently obtained food stamps, and they were disqualified from the food stamp program. Later, a federal grand jury indicted defendants for the unauthorized use of food stamps. Defendants then moved in the district court to dismiss the federal charges, claiming that the administrative action barred the criminal action, which was denied.

The Court of Appeals for the Fourth Circuit affirmed, holding that a state administrative food stamp hearing does not bar a subsequent criminal prosecution. The court found nothing in the legislative history of the relevant sections indicating that Congress wished to bar federal criminal prosecutions instigated after the imposition of state administrative sanctions. United States v. Ramsey, 774 F.2d 95 (1985), 22 CLB 161.

48. DUE PROCESS

§ 48.00 In general

U.S. Supreme Court A Virginia state inmate brought a civil rights action to recover damages for injuries sustained when he slipped on a pillow negligently left on a stairway by a sheriff's deputy. He claimed that the negligence deprived him of his "liberty" interest in freedom from bodily harm "without due process of law." The district court granted summary judgment for the state, and the Court of Appeals for the Fourth Circuit affirmed.

The Supreme Court affirmed, holding that the due process clause is not implicated by a state official's negligent acts causing unintended loss of or injury to life, liberty, or property. The Court reasoned that while the due process clause is intended to protect against abuses of power by public officials, negligence suggests no more than a failure to conduct oneself as a reasonable person, not as an abuse of power. Daniels v. Williams, 106 S. Ct. 662 (1986), 22 CLB 378.

§ 48.01 —Interpretations by state courts

Alaska Defendants were convicted of unrelated criminal charges. After their arrests, they were taken to police stations and questioned by police officers. Both defendants made inculpatory statements during their respective interrogations. In both cases, a functional audio or video recording device was present in the interrogation rooms and was used during part, but not all, of the interrogations. Before their respective trials, defendants moved to suppress their confessions. They both claimed that their confessions were obtained in violation of their due process rights. The police officers in the two cases offered accounts of the interrogations that conflicted with those of the defendants. In both cases, the trial court chose to believe the police officers' recollections of the interrogations and decided that the confessions were voluntary and admissible. Defendants were ultimately convicted of the charges, and they appealed, on the ground that the failure to record their interrogations constituted a violation of their due process rights under the Alaska Constitution.

The Alaska Supreme Court held that the unexcused failure to record electronically the custodial interrogations conducted in places of detention violated defendants' due process rights under the Alaska Constitution. The court stated that such recordings are required by state due process provisions when the interrogation occurs in a place of detention and such recording is feasible, as in the present case. Recording, ruled the court, is now a reasonable and necessary safeguard against the violation of an accused's right to counsel, right against self incrimination, and right to a fair trial. To satisfy these due process requirements, the recording must clearly indicate that it recounts the entire interrogation, so that courts are not left to speculate about what really transpired. Accordingly, the court reversed defendants' convictions and remanded their cases for further proceedings. Stephan v. State, 711 P.2d 1156 (1985), 22 CLB 295.

Colorado Defendant was charged with introduction of contraband in the first degree. Bond was posted for her release, and she was subsequently convicted of the charged offense. After her conviction, and while still on bond, defendant was ordered to appear before the trial court for rulings on her motion for a new trial and for sentencing. Defendant failed to appear, and a warrant was issued for ther arrest. She

was then arrested and charged with violating bond conditions. Subsequently, she was convicted of that offense and sentenced to a mandatory one-year prison term to be served consecutively to her sentence for the introduction of contraband conviction. Defendant appealed the one-year sentence on the grounds that a statutorily imposed minimum prison term and a prohibition against the introduction of mitigating circumstances by a person convicted of bail bond violation were unconstitutional abridgements of equal protection and due process. Defendant claimed that the relevant statute drew an impermissible distinction between persons failing to appear for judicial proceedings and persons convicted of other class five felonies.

The Colorado Supreme Court affirmed the conviction and sentence. A distinction between different classes of felonies or between different crimes within the same felony class was not unconstitutional. The distinction made was neither arbitrary nor unreasonable, and the legislature therefore had the right to draw such a distinction. The legislature could rationally decide that the failure to appear for judicial proceedings, as required by a bail bond, constituted a sufficiently egregious disruption of the judicial system as to justify the imposition of a mandatory minimum sentence. People v. Garcia, 698 P.2d 801 (1985), 22 CLB 174.

Pennsylvania Defendant was convicted of a felony offense and was sentenced to a five-year prison term, as required by the Mandatory Minimum Sentencing Act, which mandates a minimum five years' total imprisonment for visible possession of a firearm during commission of specified felonies. On appeal, defendant argued that the firearm possession should have been treated as an underlying element of the offense. Defendant claimed that to do otherwise would effectively create a new class of upgraded felonies of which visual possession is a material element. Defendant went on to argue that the mandatory sentence was an unconstitutional violation of his due process rights.

The Pennsylvania Supreme Court affirmed the conviction and the sentence imposed on defendant. The Due Process Clause of the federal constitution, as applied to the Act in question through the Fourteenth Amendment, does not require that physical possession of a firearm during commission of certain felonies be treated as an element of an underlying offense. Visible possession should not be considered as a separate crime, but relates only to the sentence imposed on defendant for the offense of which he was convicted. This provision does not remove the State's burden to prove the crime beyond a reasonable doubt, and does not deprive defendant of his due process rights. Commonwealth v. Wright, 494 A.2d 354 (1985), 22 CLB 86.

53. FREEDOM OF SPEECH AND EXPRESSION

§ 53.00 In general

Missouri Defendant was convicted of child abuse for taking nude photographs of a child under the age of 17. According to the statute under which defendant was convicted, "A person commits the crime of abuse of a child if he photographs or films a child less than seventeen years old engaging in a prohibited sexual act. . . ." The statute goes on to state that prohibited sexual acts include nudity, "if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." On appeal, defendant argued that this definition was unconstitutionally vague and that, in any case, his actions were protected by the First Amendment.

The Missouri Supreme Court upheld the conviction, ruling that the statute was not unconstitutionally vague, and that defendant's conduct was not shielded from statutorily imposed sanctions by the First Amendment, because the statute proscribing photographing nude children did not violate the First Amendment overbreadth doctrine. The court stated that "the fundamental observation supporting this conclusion is that the activity engaged in by the defendant and prohibited by the statute is distinctly conduct, as contrasted with speech. . . . Furthermore, the prohibited conduct is clearly that in which the state has a compelling interest to prevent." That is, the issue is one of child abuse and not freedom of speech. State v. Helgoth, 691 S.W.2d 281 (1985), 22 CLB 81.

§ 53.05 —Speech

Oregon Defendant was charged with harassment for making two telephone threats to inflict serious physical harm on another person. He threatened to kill one person and her family and to bomb her home and car, and he threatened to kill another person and to kidnap, rape, and kill that person's children. The state statute under which defendant was charged prohibited harassment, defined as alarming another person by conveying a telephonic or written threat to inflict serious physical injury or commit a felony. Defendant challenged the constitutionality of the statute, contending that it violated the Oregon Constitution's guarantee of free expression.

The Oregon Supreme Court held that the statute did not violate the state constitution's protection-of-free-expression provision. The court ruled that an exception is made to the guarantee of free speech for a threat to use physical force or to otherwise commit a crime, which threat reasonably alarms the threatened person under the circumstances. The threat, however, must be genuine; that is, there must be evidence that the threat will be followed by action, as determined not by the threatened person but by an objective fact finder. State v. Moyle, 705 P.2d 740 (1985), 22 CLB 292.

55. RIGHT TO JURY TRIAL

§ 55.00 In General

Hawaii Defendant was found guilty by a trial court of driving while under the influence of intoxicating liquor (DUI). After he was issued a citation, defendant refused to submit to breath or blood tests to determine the alcohol content in his body. After a statutorily mandated implied consent hearing, defendant demanded a jury trial, but his request was denied. The trial court found him guilty of the DUI charge; and, since defendant had previously been convicted of a DUI offense, he was given a $500 fine and a one-year driver's license suspension. On appeal, defendant argued that he was entitled to a jury trial.

The Hawaii Supreme Court reversed defendant's conviction and remanded the case for retrial by jury. Defendant had the right to a jury trial, because driving under the influence of intoxicating liquor, with which defendant was charged, is a constitutionally serious offense. Although an individual is not constitutionally entitled to a jury trial for all offenses, a criminal charge that is not "petty," but "serious," entitles an individual to a trial by an impartial jury. To determine whether a crime is serious or not, courts look to its treatment at common law, the authorized penalty, and the gravity of the offense. Automobiles are not covered by common law; but, because of their importance in modern society, courts have had to supplement common law with their own standards. It is this precedent that the court looked to in the instant case. Driving while under the influence, which can cause injury to others, and which carries cumulatively severer punishments for repeat offenses, is of such a magnitude as to qualify as a serious crime; and, thus, a defendant charged with same is entitled to a jury trial. State v. O'Brien, 704 P.2d 883 (1985), 22 CLB 174.

Nevada Defendant was convicted of first-degree murder, burglary, robbery, and attempted sexual assault. At trial, the prosecutor used six of his seven peremptory challenges to remove all four blacks and both Hispanics from the potential jury panel. Defendant was himself black, and the eventual jury was entirely white, as was the murdered man and his wife, the target of the attempted sexual assault. On appeal, defendant argued that the prosecutor misused his peremptory challenges to remove the black and Hispanic jurors solely on the basis of their minority group membership, thereby denying defendant his Sixth Amendment right to a jury drawn from a fair cross-section of the community.

The Nevada Supreme Court affirmed the trial court's conviction, ruling in part that the prosecutor's action in removing all black and Hispanic jurors from the panel did not deprive defendant of his Sixth Amendment right to a trial by impartial jury. The court cited Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824 (1965), as dispositive on the issue of whether a prosecutor may use peremptory challenges to remove from a jury panel all

members of a specifically recognizable group, particularly a racial or ethnic minority. The court held in *Swain* that the peremptory removal of all members of a defendant's minority group does not offend the Equal Protection Clause. A peremptory challenge is by nature subjective, and may be open to prejudice. Nonetheless, a peremptory challenge may be exercised without given reason, and is not subject to judicial inquiry into its motive. Thus, following *Swain*, the Nevada Supreme Court decided in this case that the prosecutor had a right to peremptorily challenge jurors as he did. Nevius v. State, 699 P.2d 1053 (1985), 22 CLB 82.

§ 55.05 —Procedural requirements

U.S. Supreme Court The defendant and others were indicted for armed robbery in Rhode Island state court. During the trial, four uniformed state troopers sat in the first row of the spectator's section of the courtroom to supplement the customary security force. Defense counsel's objections were overruled after the jurors responded during voir dire that the troopers' presence would not affect the defendant's ability to get a fair trial. The defendant was convicted, and the Rhode Island Supreme Court affirmed. The defendant's habeas corpus petition was denied in the district court, but the court of appeals reversed.

The Supreme Court reversed, holding that the troopers' presence at trial was not so inherently prejudicial that the defendant was denied his constitutional right to a fair trial. The Court reasoned that every practice tending to single out the accused from everyone else in the courtroom must not necessarily be struck down. Holbrook v. Flynn, 106 S. Ct. 1340 (1986), 22 CLB 476.

57. RETROACTIVITY OF CONSTITUTIONAL RULINGS

§ 57.20 Traffic violations

Colorado Defendant's driver's license was revoked after his conviction for driving while impaired by the consumption of alcohol within five years of a prior conviction for the same offense. According to a Colorado state statute enacted between the time of defendant's previous conviction and his latest one, license revocation became mandatory for a second offender convicted "within the previous five years" of driving while impaired. On appeal, defendant argued that the application of the new law to his case constituted retroactive punishment and offended the constitutional proscription against ex post facto legislation.

The Colorado Supreme Court, en banc, affirmed defendant's conviction and license revocation. The prohibition against retrospective legislation applies only to criminal penalties and, besides, defendant's license revocation, based on a prior conviction but triggered by the latest one, was not an additional penalty for the earlier conviction but a more severe penalty for the recent one. In addition, the relevant statute, before its emendation, also required license revocation upon a second conviction "within a period of five years" for driving while impaired. Thus, the court held, the legislature's intent was clearly to impose a stiffer penalty on repeat offenders convicted twice within a five-year period. Zaragoza v. Director of Dept. of Revenue, 702 P.2d 274 (1985), 22 CLB 174.

58. PROHIBITION AGAINST UNLAWFUL SEARCHES AND SEIZURES

SCOPE AND EXTENT OF RIGHT IN GENERAL

§ 58.00 What constitutes a search

North Dakota Defendant was convicted of driving with a suspended driver's license. He had been stopped by a police officer conducting "routine" safety checks, in which the officer pulled over cars at his own discretion, whether or not the cars exhibited any safety defects. Defendant was subjected to such a stop, at which time the police officer asked to see his driver's license. Defendant produced an expired license, and when the officer ran a check, he discovered that defendant's license had been suspended. Defendant was thereupon arrested, charged, and subsequently convicted of driving with a suspended license. On appeal, defendant argued that the vehicle safety check conducted by the police officer was a constitutionally impermissible search and seizure

under the Fourth Amendment of the U.S. Constitution. Defendant cited Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391 (1979), which prohibited random stops.

The North Dakota Supreme Court held that the state had not proved that the procedures used by the police officer complied with the Fourth Amendment. Even though the police officer testified that the procedures he followed were in accordance with standard procedures he learned in the academy, there is no evidence in the record to show what those procedures were. Without knowing how much discretion a police officer has in such a safety check, there is no way that such policies and procedures can be deemed constitutionally permissible. Even though the facts in this case differ from those of *Delaware v. Prouse*, the principle is the same, that is, random stops of cars are unconstitutional. In this case, the state did not meet its burden of proof that the safety check conducted by the police officer was in compliance with the Fourth Amendment. State v. Goehring, 374 N.W.2d 882 (1985), 22 CLB 286.

Wisconsin Plaintiff who was allegedly the subject of official police surveillance at softball games and taverns brought a Section 1983 action against the city. The plaintiff claimed to be the victim of a conspiracy among his wife and two police officials. The complaint was dismissed for failure to state a claim upon which relief could be granted. On appeal, plaintiff argued that the police misconduct deprived him of his Fourth Amendment right to be free from unreasonable searches and seizures.

The Wisconsin Supreme Court affirmed and declared that police surveillance of what a person does in public infringes no constitutional right even if there is no legitimate reason for the police to be interested. The plaintiff alleged that, at the police chief's order, he was followed to softball games and taverns. An officer allegedly conducted license checks on cars in the parking lots of places plaintiff frequented and took notes on plaintiff's activities. The police justified their conduct by publicly claiming that plaintiff was suspected of selling and using drugs, even though they allegedly knew these allegations to be baseless. The court pointed out that what a person knowingly exposes to the public is not a subject of Fourth Amendment protection. Not all government surveillance is per se violative of constitutional rights. Weber v. City of Cedarburg, 384 N.W.2d 333 (1986), 22 CLB 490.

§ 58.10 Property subject to seizure

§ 58.15 —Plain view

Colorado Defendant was convicted of possession of cocaine and marijuana. Defendant's house had been burglarized and a safe stolen therefrom. Police apprehended a suspect who told them that he and two others had burglarized a nearby residence from which they had removed the safe because they believed it contained money and drugs. Police located the house and found the front door open and the door jamb splintered. They shouted, "Police," and then entered the house, where they observed a triple-beam scale, a mirror, two teaspoons, and a playing card, all bearing a white residue. Based on their suspicion that defendant's safe recovered from the burglars contained drugs, the police held the safe overnight at headquarters before a search warrant was obtained. During this period an exploratory sniff of the safe by a narcotics detection dog was conducted to determine whether it contained drugs. The result was positive. After obtaining a search warrant, the safe was opened and both cocaine and marijuana were discovered inside. Defendant appealed, contending that his conviction was based on evidence that the district court should have suppressed because it was obtained in violation of the Fourth Amendment and the state constitution.

The Supreme Court of Colorado, en banc, found that a narcotics detection dog's sniff of a stolen safe that had been taken to the police station was a Fourth Amendment search, but that it required neither a warrant nor probable cause because the police had reason to believe that the safe contained controlled substances. Having decided that the sniff was a search, the majority turned to the degree of suspicion required to support it. Weighing the government's interest in detecting illegal narcotics against the limited intrusiveness of this kind of search, the majority con-

cluded that the balance is best struck by requiring only reasonable suspicion. Statements by the burglar who stole the safe, and a police officer's observation of drug paraphernalia in plain view in the safe owner's home, justified a reasonable suspicion that the safe contained drugs. People v. Unruh, 713 P.2d 370 (1986), 22 CLB 486.

Indiana Defendant was convicted of dealing in marijuana. The marijuana was being grown in a greenhouse on defendant's property, in a heavily wooded area. The marijuana was discovered during an aerial search conducted by the Indiana State Police, who had received information from a person who had helped construct a barnlike structure on defendant's property, and who had been warned by defendant not to tell anyone about the building. After the observation of the marijuana in the aerial surveillance, a search warrant was issued for defendant's barn and greenhouse. Officers executing the warrant found marijuana in the barn and greenhouse, and defendant was subsequently arrested. At trial, defendant moved to suppress the evidence seized during the search of the barn and greenhouse on the ground that the officers conducted a warrantless search when they flew over his property.

The Indiana Supreme Court held that defendant's Fourth Amendment rights were not violated by the aerial surveillance, which constituted an observation and not a search. An aerial search should be considered no different than a ground search as it relates to objects in plain view, and the flight over defendant's property was merely an observation not requiring a warrant. Blalock v. State, 483 N.E.2d 439 (1985), 22 CLB 293.

North Dakota Defendants were charged with possession of stolen property and moved to suppress all items seized on the ground that police officers relied on illegally obtained evidence to secure their statement of probable cause to obtain search warrants. After hearing, the district court entered an order denying the motion to suppress the controlled substances and paraphernalia seized, but suppressed "all other evidence seized" in executing the three search warrants of March 13 and 14. One of the officers executing the warrant authorizing the search for drugs was aware that an occupant of the drug suspect's house had been seen in the vicinity of a burglary. For this reason, when an unplugged microwave oven was found sitting on a cooler in the basement, the officer lifted it and copied the serial number off the back. He then radioed for a check on the number and was informed that the oven had indeed been stolen. The trial court suppressed the admission of the oven into evidence on the ground that its seizure resulted from the officer's "bad faith" in using a valid warrant to conduct a general, exploratory search.

The North Dakota Supreme Court reversed, finding that the officers did not act in "bad faith" when they entered the house pursuant to a search warrant with the hope and intention of finding evidence of other crimes unrelated to the subject of the warrant. The majority ruled that search and seizure issues should not be resolved in terms of the subjective intent of the officers involved but by objective standards of reasonableness. The officer's treatment of the oven, the court continued, met the requirements of Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971), for admissibility under the plain view doctrine. The court also noted that contraband need not even be visible in order for a plain view seizure to be justified, citing Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535 (1983). Thus, the fact that the serial number was examined in order to further the officer's suspicions is irrelevant; the distinctive location of the oven was significant to the trained eye of the officer. State v. Riedinger, 374 N.W.2d 866 (1985), 22 CLB 289.

§ 58.25 —Exigent circumstances

Nebraska Defendant was convicted of first-degree false imprisonment and use of a knife to commit a felony. On December 31, 1983, defendant was picked up by a young couple while hitchhiking in Omaha, Neb. The weather was snowy and cold, and the couple offered defendant a ride home. He accepted, and directed them to his residence, whereupon he pulled out a hunting knife and threatened to kill the female member of the couple if the male did not accompany him inside. The male refused to leave the car and proceeded to drive the car to a police station, where he

rammed his car into a police vehicle. The couple escaped from defendant, who fled the scene. The couple flagged down a car, which returned them to the police station. They told their story to a police officer who sent another officer to defendant's home, where a neighbor stated that he had just seen a man fitting defendant's description enter the apartment house. The officer walked up the porch steps, saw that the front door was open, and entered the building, where he saw snowy footprints in the hall leading to apartment number 10. The officer knocked on the door of that apartment, but there was no response from inside. An apartment resident subsequently directed the officer to a caretaker, who returned with the officer to apartment number 10. When there was again no answer to a knock on the door, the police officer opened the door with a passkey. The officer found defendant in bed and arrested him. Defendant was taken to the police station, identified by the couple and charged. He was subsequently convicted and sentenced for the offenses charged. On appeal, defendant argued that his arrest violated the Fourth Amendment, in that the police officer did not have a warrant to enter defendant's home when he arrested him.

The Nebraska Supreme Court affirmed the convictions and sentences. Absent exigent circumstances, a warrantless entry and arrest is presumed unreasonable and, thus, unconstitutional. In this case, however, there were exigent circumstances that allowed the police officer to enter defendant's residence without a warrant. Exigent circumstances exist when a law enforcement officer has (1) probable cause to believe that a suspect has committed a serious offense; (2) a reasonable belief that a suspect is on the premises to be entered; and (3) a factual basis to reasonably believe that a delay will pose a danger to an officer or another, or will allow a suspect to escape or remove or destroy evidence. In this case, the court ruled that the arresting officer had probable cause to believe that a serious crime had been committed, in that the couple had been kidnapped at knifepoint by a man whose description matched defendant's; reasonable belief that defendant was present, in that a neighbor told the officer that he had chased a man fitting defendant's description from his yard into the apartment house; and a factual basis for believing that a delay, due to the necessity of obtaining a warrant, would allow defendant to escape, or destroy or remove evidence, since a shortage of officers caused by the weather and other factors made surveillance impossible. Thus, the warrantless entry and arrest in this case were justified by exigent circumstances, and were, therefore, constitutionally permissible. State v. Hert, 370 N.W.2d 166 (1985), 22 CLB 169.

§ 58.30 —Automobile searches

U.S. Supreme Court After a DEA agent received information that defendant's mobile home was being used to exchange marijuana for sex, he maintained a surveillance and stopped a youth leaving the vehicle. The youth told the agent that he had received marijuana in return for sexual contacts. At the request of the agent, the youth returned to the mobile motor home and knocked on the door, whereupon defendant stepped out. Without a warrant or consent, the agent entered the mobile motor home and observed marijuana. After his motion to suppress evidence was denied, the defendant was convicted in California State court, but the California Supreme Court reversed.

The Supreme court reversed, holding that the warrantless search of the mobile motor home did not violate the Fourth Amendment. The Court explained that when a vehicle is being used on the highways and is found stationary in a place regularly used for residential purposes, this is a reduced expectation of privacy stemming from the pervasive regulation of vehicles capable of traveling on highways. California v. Carney, 105 S. Ct. 2066 (1985), 22 CLB 69.

U.S. Supreme Court After defendant was convicted in New York State of criminal possession of a weapon in the third degree, the Appellate Division affirmed, but the state court of appeals reversed, finding that the police officers had lawfully stopped the vehicle but had conducted an illegal search of its interior. When one of the officers reached into the car to remove some papers on the dashboard that obscured the vehicle identification number, he noticed the handle of a gun pro-

truding from underneath the driver's seat. The gun was seized, and the driver was arrested.

The Supreme Court reversed, holding that the police officer's action in searching the car did not violate the Fourth Amendment. The Court reasoned that since defendant had no reasonable expectation of privacy as to the vehicle identification number, the placement of papers obscuring it was insufficient to create a privacy interest. The Court also found that the court of appeals decision did not rest on an adequate and independent state ground so as to deprive the Supreme Court of jurisdiction. New York v. Class, 106 S. Ct. 960 (1986), 22 CLB 380.

§ 58.43 —Inventory searches

Colorado Defendant moved to suppress evidence seized from his backpack during an automobile inventory search. Defendant had been stopped by a police officer for speeding, and in the course of the stop the officer concluded that defendant was intoxicated. The police officer administered sobriety tests, and thereupon arrested defendant for driving while intoxicated. After the arrest, the officer proceeded to impound defendant's car. While waiting for a tow truck to arrive, another police officer began to make an inventory of the items in defendant's car. In the course of the inventory, the police officer discovered a closed backpack, where he found, among other things, a zippered nylon bag. The police officer opened the bag, where he found three tin cans. The officer then opened the cans, where he found a substance that was later determined to be cocaine. This contraband is at issue in the present motion to suppress evidence. At trial, defendant argued that the evidence should be suppressed because the inventory was not conducted in accordance with standard procedure, and was merely a pretext for a warrantless search. Defendant argued that the police officers exceeded the constitutional limits of a proper inventory search by examining the inside of the backpack.

The Colorado Supreme Court held that the automobile inventory search of defendant's backpack did not comply with Fourth Amendment standards of reasonableness. The court determined that there was no exigency to justify the warrantless search of the backpack. Alternative means were available to safeguard the backpack until a search warrant could be obtained. Defendant's privacy interests in the cans containing the contraband outweighed the state's need to inventory their contents. People v. Bertine, 706 P.2d 411 (1985), 22 CLB 284.

§ 58.55 Search of parolees

California Defendant was convicted of robbery with use of a firearm, robbery with use of a firearm and infliction of a great bodily injury, and of being an ex-felon in possession of a firearm, for which he was sentenced to death. Prior to trial, defendant moved to suppress the 7-Eleven paper bag with two $5 bills, which investigating officers found the evening after the killing of the 7-Eleven store clerk in the course of a warrantless search of the apartment that defendant shared with his girl friend. The trial court denied defendant's motion, ruling that the search was valid as an incident to defendant's status as a parolee. On appeal, defendant argued that the trial court erred in ruling that the evidence was admissible.

The California Supreme Court, en banc, upheld the warrantless search on the ground that the defendant's parole agent had authorized the search. The court indicated that the search was a valid incident of defendant's felony parole status. Unlike probationers, the court added, parolees have served time in prison for their crimes. They have been imprisoned because courts have found them to pose a greater risk to society. This fact, the court stated, justifies the inclusion of a warrantless search condition among the terms on which felony parole is granted. Therefore, warrantless searches of parolees are not per se unreasonable if conducted for a purpose properly related to parole supervision. People v. Burgener, 714 P.2d 1251 (1986), 22 CLB 490.

§ 58.70 Stop and frisk

Connecticut Defendant was convicted of first-degree robbery. After commission of the crime, defendant was stopped while walking by a police officer searching the area in the vicinity of the robbery site. Defendant's location, general physical de-

scription, and demeanor aroused the police officer's suspicion. The police officer, who was alone at the time, decided to await the arrival of a detective called to investigate the robbery and of a witness to the crime for possible identification of defendant. The police officer frisked defendant and placed him in the back seat of his patrol car. The police officer told defendant that he would be taken home when the detective completed his interrogation. The police officer then made radio contact with headquarters to report that he had a suspect. He found out that a car used in the robbery belonged to defendant, whom the police officer thereupon arrested. On appeal, defendant charged that his detention by the police officer was unreasonably intrusive, and, thus, unconstitutional.

The Connecticut Supreme Court found no error and affirmed defendant's conviction. Defendant's detention was constitutionally permissible under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968), because the police officer had sufficient articulable grounds to suspect that defendant had committed the robbery. The court stated:

> [a] police officer who has articulable grounds to believe that a crime has been committed and to detain someone who may be implicated in that crime must be permitted to make reasonable use of the resources at his disposal at the site of the investigatory stop.

Even defendant conceded that there were sufficient grounds to suspect him of the crime, and, since his detention was not unreasonably lengthy or intrusive, the conviction was upheld. State v. Braxton, 495 A.2d 273 (1985), 22 CLB 178.

Virginia Defendant was convicted of failing to identify himself at the request of a police officer and possession of heroin with intent to distribute. He was stopped by a police officer on a street in the vicinity of several recent burglaries. Defendant matched the description of the suspect in those burglaries, including the clothes he wore and a bag he carried at the time. The police officer asked defendant for identification, but he produced identification that was obviously false. The police officer searched defendant's bag and, although he only found in it a camera and a set of headphones, a later, more thorough search uncovered bags of heroin. Defendant appealed his conviction on the ground that his detention and questioning were unjustified.

The Virginia Supreme Court held that defendant's detention and questioning were justified under Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968). *Terry* permits a police officer to detain and question someone, provided the officer has a reasonable suspicion, based on objective facts, that the person was involved in a criminal act. In this case, defendant met a physical description of a suspect in a series of crimes, and his actions at the time of his detention and questioning by the police officer were of a suspicious nature. *Terry* also permits a police officer to frisk a suspect if there is a reasonable belief that the suspect is armed, and when the police officer felt the suspect's bag he felt a hard object, which could reasonably have been believed to be a weapon, although it was not. Jones v. Commonwealth, 334 S.E.2d 536 (1985), 22 CLB 283.

BASIS FOR MAKING SEARCH AND/OR SEIZURE

§ 58.75 Search warrant

§ 58.80 —Sufficiency of underlying affidavit

Alabama Defendant was convicted of first-degree attempted rape. His arrest warrant was based on a "bare bones" affidavit given by his former girl friend, who claimed that defendant had sexually abused her daughter, who had contracted a venereal disease.

Affiant's conclusion that defendant molested her daughter was made without any evidence. On appeal, defendant argued that his arrest warrant was fatally defective, in that it was based only on a "bare bones" affidavit. The state, in its petition for certiorari, argued that, according to Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983), a determination of probable cause should be given great deference, and that such cause existed in this case.

The Alabama Supreme Court held that an arrest warrant based solely on affiant's conclusion that defendant committed the crime was fatally defective. The court stated that the "bare bones" affidavit given in this case was of the type that the

U.S. Supreme Court in *Gates* found would be inadequate. The affiant's conclusion that defendant committed the offense was inadequate as a basis for defendant's arrest warrant. Crittenden v. State, 476 So. 2d 632 (1985), 22 CLB 293.

Arkansas Defendant was convicted of possession of a controlled substance, marijuana. The marijuana was found in a search, pursuant to a warrant, based on a form affidavit with the information inserted in blanks. The only statements in the affidavit in the present tense were those preprinted on the form. The wording was in the past tense and imprecise as to when in the past the criminal activity allegedly occurred. At trial, defendant moved to suppress the evidence, on the ground that the search warrant was invalid, in that the affidavit on which it was based failed to mention the time during which the criminal activity was observed.

The Arkansas Supreme Court held that the affidavit, which contained no reference to the time at which defendant allegedly possessed marijuana, did not provide sufficient information upon which a probable cause determination could be made. The court stated that the primary issue in this case was the application of the good-faith exception to the exclusionary rule enunciated by the U.S. Supreme Court in United States v. Leon, 104 S. Ct. 3405 (1984). In *Leon*, the Supreme Court enumerated four errors which a police officer's "objective good faith" cannot cure. Errors three and four relate to indicia of probable cause in an affidavit and deficiencies of a search warrant, respectively. The court further stated that pursuant to *Leon*, the absence of a reference to time in an affidavit does not make the subsequent search warrant automatically defective. Rather, the court looks to the "four corners" of the affidavit to determine if they can establish with certainty the time at which the criminal activity was observed. If the time can be so inferred, then the officer's objective good faith reliance on a magistrate's assessment will cure the omission. In this case, though, the omission of any reference to time in the affidavit meant that none could be inferred, and the affidavit was, therefore, defective. The warrant based on the affidavit, therefore, was also invalid, and the results of the unreasonable search and seizure should have been suppressed. Accordingly, the court reversed defendant's conviction. Herrington v. State, 697 S.W.2d 899 (1985), 22 CLB 297.

Colorado Defendant moved to suppress evidence of marijuana growing, which was seized pursuant to warrants issued upon affidavits. The warrants were based partly on information supplied by a first-time, confidential informant. The informant related that defendant was growing marijuana in two residences for illegal sale. The informant, who had used marijuana in the past and was, thus, familiar with its use and sales methods, claimed to have been inside the defendant's residences in the recent past. On the basis of this information, two detectives accompanied the informant to defendant's houses to verify the information. After viewing defendant's residences from outside and verifying that the houses matched the informant's descriptions, the detectives prepared an affidavit in order to obtain search warrants. A district attorney, however, questioned the time period of "recent past." The detectives thereupon prepared a second affidavit, which included information that the informant had been in the houses within the last thirty days. On the basis of the informant's information and independent corroborative observations and research by the police, a judge issued warrants to search both of defendant's houses. The officers immediately executed the warrants and found a marijuana-growing operation inside both houses. The district court suppressed the evidence seized from both of defendant's residences, because the reference to the recent past in one of the affidavits was too vague to constitute probable cause for the issuance of a search warrant. In addition, the court concluded that the informant's claim to have been inside defendant's house within the last month failed to establish the affiant's basis of knowledge. The district court ruled that neither affidavit conformed to the totality-of-the-circumstances analysis mandated in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983).

The Colorado Supreme Court, en banc, held that there was probable cause for the issuance of warrants to search defendant's residences for marijuana. The court stated

that the second affidavit, which incorporated information contained in the first one, contained sufficient information "within its four corners" to establish probable cause for the issuance of a search warrant under the Fourth Amendment to the United States Constitution and under the Colorado Constitution. The task of an issuing judge is to make a "practical, commonsense decision" as to whether, given the totality of the circumstances set forth in an affidavit, there is a "fair probability" that evidence of a crime will be found in a particular place. The totality of the circumstances in this case included not only the informant's tip, but independent police corroboration of such information. The detectives who prepared the affidavits conducted their own investigation to add credibility to the confidential informant's tip. The combination of this independent corroboration by the detectives with the detailed statements provided by the informant, when viewed under the "practical and common-sense analysis mandated by *Gates*," ruled the court, established probable cause to issue warrants to search defendant's houses. People v. Pannebaker, 714 P.2d 904 (1986), 22 CLB 483.

§ 58.105 Search incident to a valid arrest

§ 58.110 —Probable cause

U.S. Supreme Court After an Erie County, New York investigator viewed videocassette movies rented from respondents' store, he executed affidavits summarizing the theme and conduct depicted in each movie, and he attached the affidavits to search warrant applications. The warrants were executed and the movies seized, and the respondents were charged under a New York obscenity statute. The suppression motion was granted by a local judge, and the county court and New York Court of Appeals affirmed

The Supreme Court reversed, holding that no higher probable cause standard was required by the First Amendment for issuance of the warrant in question. Applying a "fair probability" standard, the Court found that the warrant was supported by probable cause to believe that the movies were obscene under New York law. New York v. P.J. Video, Inc., 106 S. Ct. 1610 (1986), 22 CLB 476.

§ 58.125 Permissible scope of incidental search

California Defendant was convicted of robbery. When he was arrested, in his vehicle, the police asked defendant if they could search his car's trunk. Although disputed by the State, it was established at trial that defendant refused. Nonetheless, the police searched a briefcase and two tote bags found in the locked trunk of defendant's vehicle, absent a warrant. In these articles, the police found evidence linking defendant to the crime. Although defendant moved to suppress this evidence at trial, his motion was denied, and the evidence was used to convict him of robbery. On appeal, defendant argued that the search of the briefcase and tote bags without a warrant violated the California Constitution, and the evidence obtained through the search should have been suppressed.

The California Supreme Court reversed the conviction and remanded the case. Although the arresting officers had probable cause to search defendant's vehicle, they did not have probable cause to search the bags found in the locked trunk, and thus could not lawfully conduct such a search absent a warrant. The warrantless search of the briefcase and tote bags violated Article I, Section 13 of the California Constitution, and the evidence obtained thereby should have been suppressed. The requirement to obtain a warrant would not have imposed an undue burden on the police, because they could have merely impounded the items until a warrant was obtained. Since the evidence obtained, illegally, helped convict defendant, the verdict was reversed and the case remanded. People v. Ruggles, 702 P.2d 170 (1985), 22 CLB 86.

§ 58.130 Investigative stops

Illinois Defendant was charged with driving under the influence of alcohol. He had been arrested as the result of a temporary roadblock, ostensibly erected to check drivers' licenses, but in reality to deter and detect drunken drivers, as admitted to by the state. Before trial, defendant moved to suppress his arrest and all evidence obtained as a result of it, on the ground that the roadblock violated the Fourth Amendment prohibition against unreason-

able searches and seizures. The trial court granted defendant's motion to suppress, and the state appealed.

The Illinois Supreme Court held that the temporary roadblock erected to identify drunken drivers did not violate the Fourth Amendment. A roadblock is not per se violative of the Fourth and Fourteenth Amendments' requirement that a stop, or search and seizure, be based on probable cause. The question of whether a roadblock violates the Fourth Amendment is one of reasonableness, determined by balancing the state's need for intrusion against an individual's legitimate expectation of privacy. The public interest here, the prevention of drunken driving and its attendant dangers, was compelling, and outweighed the minimal, objectively or subjectively determined, intrusion caused by the roadblock stop. The court therefore reversed the suppression order and remanded the case to the trial court for further proceedings. People v. Bartley, 486 N.E.2d 880 (1985), 22 CLB 298.

Massachusetts Defendants were charged with operating a motor vehicle while under the influence of alcohol, and moved to suppress evidence obtained as the result of a roadblock. The district court denied the motions, and defendants appealed, alleging violations of their rights under the Fourth and Fourteenth Amendments and their state counterparts.

The Supreme Judicial Court of Massachusetts ruled that so long as a roadblock is conducted in accordance with guidelines promulgated by state law enforcement officials, any seizures made pursuant to them will be considered reasonable under the federal and Massachusetts Constitutions. The court pointed out that the guidelines were developed with a view towards compliance with past Supreme Judicial Court rulings concerning roadblock checkpoints, and contain a variety of provisions designed to limit the discretion of officers operating roadblocks. Advance planning by supervisory personnel of the details of the operation, including date, location, time, duration, and pattern of vehicles to be stopped, is mandated. Administrative personnel must select the roadblock sites, which are limited to areas where accidents or prior arrests for drunken driving have occurred. The guidelines also prescribe a number of measures designed to promote safety by warning motorists of a roadblock ahead, keeping the roadway clear, and minimizing the duration of each stop. In addition, clear criteria are set out governing when and how sobriety checks of drivers may be carried out. The guidelines also require the officer in charge of a roadblock to ensure that detailed records are kept concerning the operation. Finally, police directors must give advance notice of any intended roadblocks to the media at least three days in advance. Therefore, after balancing these procedures against the individual motorist's expectation of privacy, the majority concluded that a seizure made in the course of a roadblock that is carried out pursuant to these guidelines would be reasonable under both the state and federal constitutions. Commonwealth v. Trumble, 483 N.E.2d 1102 (1985), 22 CLB 289.

Minnesota A driver had his license revoked for driving while under the influence. A chemical test administered to the driver after his arrest indicated that he had a blood alcohol concentration of .10 or more. The driver was given the test at a police station after he was stopped by officers on patrol. The police had been tipped off by an anonymous caller that the driver of the indicated car was possibly drunk, and a radio dispatch to a patrol car on the given route led to the stop and subsequent arrest. Before the police officers stopped the driver, though, they followed his car for a short while, but they did not observe any erratic driving. Nonetheless, based on the anonymous tip, they pulled the driver over. They smelled alcohol on the driver's breath, noted that his speech was slurred, his eyes were bloodshot, and his gait was unsteady. They thereupon arrested him, took him to the station, and administered the chemical test, which showed he had a blood alcohol concentration of .155. On appeal, the driver argued that the police officers who pulled him over did not have sufficient reliable information to justify the stop, thus violating the Fourth Amendment.

The Minnesota Supreme Court held that the police did not have the requisite reliable indicia to justify the stop, and thus violated the driver's constitutional rights. An anonymous tip received by the police, not confirmed by erratic driving while the

police followed the drunken driver, did not constitute the minimal indicia necessary to justify an investigative stop. Olson v. Commissioner of Public Safety, 371 N.W.2d 552 (1985), 22 CLB 176.

Nebraska Defendant was convicted in municipal court of driving while under the influence of alcohol. On appeal, the district court reversed the conviction on the ground that the evidence of defendant's intoxication had been obtained as the result of an unconstitutional seizure of his person.

The Nebraska Supreme Court affirmed the district court by holding that a checkpoint devised by field-level officers insufficiently limited their discretion and hence violated the Fourth Amendment. In this case, the checkpoint was planned and carried out by an Omaha police unit consisting of six or seven officers commanded by a field sergeant. A marked police car, with red lights flashing, was placed on a highway near a bar just prior to closing time. The officers stopped every fourth southbound vehicle in order to determine whether the driver appeared to have been drinking. The checkpoint was not executed pursuant to any departmental standards, guidelines, or procedures that considered, weighed, and balanced the factors enumerated by the U.S. Supreme Court in Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391 (1979) and Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637 (1979). The checkpoint was therefore found to be subject to the constitutional infirmity found to exist in both *Delaware* and *Brown*; that is, a driver's reasonable expectation of privacy was rendered subject to arbitrary invasion solely at the unfettered discretion of officers in the field. State v. Crom, 383 N.W.2d 461 (1986), 22 CLB 484.

New Mexico Defendants were indicted for possession of cocaine and trafficking of controlled substances. They were arrested after being stopped for speeding by a New Mexico State Police officer. After the stop, the police officer made a routine check with the National Crime Information Computer (NCIC) to determine if the two occupants of the car were wanted or if the car was stolen. The check took a few minutes, and the results were negative on both counts.

During the time of the stop, however, the police officer noticed that the car and its occupants fit the profile of narcotics trafficking in that state, namely: (1) two persons appearing to be foreigners, (2) driving a rented car with Florida license plates, (3) across the country, (4) with a small amount of luggage, and (5) with a one-way car rental that was paid for in cash. Based on these observations, the police officer decided that he had a reasonable suspicion to investigate further and called for a backup. While waiting for assistance, he filled out a consent-to-search form. After the other officers arrived, defendants were advised of their rights and presented with the consent-to-search form, which they signed. Due to the circumstances of the situation—namely, the cold, darkness, and their location on the side of a busy highway—the responding officers accompanied defendants to a service station near the highway to conduct the search. There, the officers searched the car and found the cocaine.

After a hearing on a motion to suppress evidence, the trial court found that the detention of defendants before the consent to search was obtained and after the police officer received a negative response to his NCIC inquiry constituted an "illegal seizure." The state appealed.

The New Mexico Supreme Court held that the detention of defendants was proper because it was based on reasonable suspicion. The court cited United States v. Sharpe, 105 S. Ct. 1568 (1985), as a recent case dealing with the question of what is reasonable detention. The court in *Sharpe* stated, "In assessing whether a detention is too long in duration . . . we consider . . . whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendants."

In this case, the police officer detained defendants only for a short time (i.e., several minutes after the negative NCIC response). Considering the factors that the police officer relied on in deciding to detain defendants (i.e., the drug courier profile referred to above), the detention was based on reasonable suspicion. During the period of the initial stop, defendants appeared more nervous than would the average person stopped for speeding.

In addition, they appeared to want to get away from the police officers as quickly as possible, as evidenced by one of the defendants' requests that the police just issue them a ticket and allow them to proceed. These factors, coupled with the positive profile of drug runners, gave the police officer reasonable suspicion. The detention was appropriate under the circumstances. State v. Cohen, 711 P.2d 3 (1985), 22 CLB 389.

ELECTRONIC EAVESDROPPING

§ 58.135 In general

Court of Appeals, 2d Cir. After the defendants were charged with conspiracy to possess cocaine with intent to distribute, the district court granted their motion to suppress intercepted wire and oral communications and evidence derived from them on the grounds that the government failed to comply with the requirement of presenting tape recordings immediately to the authorizing judge for sealing upon expiration of the period of authorized surveillance.

The Court of Appeals for the Second Circuit vacated and remanded, holding that the explanation offered by the government for its failure to immediately present the tapes for sealing was adequate. The court noted that the prosecution was engaged in other urgent business and that there was no danger that the tapes had been tampered with. United States v. Rodriguez, 786 F.2d 472 (1986), 22 CLB 481.

Washington Defendants were charged with bribery. The information presented as evidence was obtained by electronic surveillance, specifically, eavesdropping conducted by federal agents and transmitted to state authorities. The State's case was ultimately based on evidence obtained by the Pierce County Sheriff. First, an informant was used; then, a deputy sheriff, working undercover, conducted an investigation—both for the benefit of the sheriff's office. After this investigation, the sheriff contacted the FBI, which joined the investigation. Initially, the informant was wired by federal authorities, and he reported directly to them. Later, the informant and the undercover agent conducted additional electronic surveillance for the sheriff's office, and it is these recordings that were in dispute in the case. At trial, defendants charged that the information obtained by the electronic eavesdropping should not be allowed to be admitted as evidence because it was illegally collected by federal officials without prior court approval where such evidence, although admissible in federal court under federal law, was inadmissible in state court under Washington law. Defendants also claimed that probable cause for issuance of the trial court order authorizing the eavesdropping could not be based on the federal tape recordings. At trial, defendants tried to suppress the tape recordings of alleged transactions, but the trial court declined to do so.

The Washington Supreme Court, en banc, ruled that "information obtained by federal officers from electronic eavesdropping conducted by them in accordance with federal law can legally be furnished to state officers; and such information may, in turn, properly be used by state officers for the purpose of establishing probable cause to obtain the issuance of an order from a state court authorizing electronic eavesdropping in accordance with state statutes." The court relied on The National Wiretapping Commission Report, whose text reads in relevant part, "Once federal officers have made their eavesdropping evidence available to state officers whose jurisdiction prohibits law enforcement electronic surveillance, the state officers probably [sic] can use such evidence. . . . Where the state officers were not involved in the original interception, they . . . do not violate the state prohibition by using the surveillance information obtained from the federal authorities." The court also stated that the federally conducted wiretap was acceptable as evidence to establish probable cause. "When the sheriff's deputies were provided information by the FBI which had been derived from FBI one party consent [the deputy sheriff] recordings, the sheriff's deputies were justified in using it for the purpose of establishing probable cause to procure a state court order authorizing electronic eavesdropping in accordance with state statutes." State v. O'Neill, 700 P.2d 711 (1985), 22 CLB 78.

SUPPRESSION OF EVIDENCE IN GENERAL

§ 58.200 Standing

Montana Defendant was convicted of escape for walking away from the Montana State Prison laundry. He was recaptured three days after his escape in the residence of his girl friend, who had offered him sanctuary. The officers who rearrested defendant had an arrest warrant for him, but did not have a search warrant for the girl friend's residence where defendant permanently resided. Discovery of defendant resulting from the warrantless search of the residence resulted in his conviction. On appeal, defendant argued that such evidence should not have been admitted, as it was the product of an illegal search. In turn, the State argued that defendant did not have the standing to challenge the search's constitutionality because he did not have a legitimate expectation of privacy in the residence of his girl friend.

The Montana Supreme Court reversed the conviction and remanded the case for further proceedings. The court ruled that it was reversible error to admit evidence obtained as a result of an unconstitutional, that is, warrantless, search. In addition, defendant had the necessary standing to challenge the legitimacy of the search of the girl friend's residence. At the time of the search, the girl friend was carrying defendant's child, and the couple subsequently married. Thus, defendant had a reasonable expectation of privacy in her home. State v. Kao, 698 P.2d 403 (1985), 22 CLB 85.

FRUITS OF THE POISONOUS TREE

§ 58.225 Evidence held inadmissible

Court of Appeals, 5th Cir. After defendant was found guilty on narcotics charges, he appealed on the ground, among others, that evidence had been illegally obtained by officers trespassing on his ranch without a warrant. The court of appeals reversed, and the Supreme Court remanded.

On remand, the Court of Appeals for the Fifth Circuit reversed, holding that the officers were not privileged, absent exigent circumstances, to seek the source of a chemical odor on defendant's ranch without a warrant. The court explained that the law enforcement officers had already crossed the perimeter fence prior to detecting the suspicious odor, and the odor was not contraband but, rather, was the odor of a legal chemical. United States v. Dunn, 766 F.2d 880 (1985), 22 CLB 75.

§ 58.230 Evidence held admissible

New York Defendants were accused of scheming to circumvent regulations which establish the requirements for valid automobile licenses and vehicle inspections. They were indicted for forgery, larceny, and related crimes, as a result of evidence obtained through electronic eavesdropping. Defendants claimed that the evidence should be suppressed because the crimes charged were not included in the Omnibus Crime Control and Safe Streets Act of 1968 and were therefore outside of the scope of surveillance allowed. The trial court suppressed the evidence obtained through the court-ordered wiretaps, and the People appealed.

The court of appeals reversed the lower court and held that the evidence could not be suppressed, because the crimes charged were "dangerous to life, limb or property," and punishable by imprisonment for more than one year, and, as such, are within the ambit of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2516[2]), which provides that electronic eavesdropping may be authorized by state statute. The standards and procedures for court-authorized eavesdropping in New York State are set forth in Civil Practice Laws Article 700. The court found that defendant's scheme to circumvent the regulations which establish the requirements for valid operator's licenses and vehicle inspections clearly endangers people and property. The criminal possession of stolen property, specifically automobiles, and the forgery of automobile operators' licenses and vehicle inspection documents could possibly lead to unsafe drivers or cars on the roads, and were, therefore, within the province of crimes dangerous to life and property. People v. Principe, 478 N.E.2d 979 (1985), 22 CLB 169.

59. PROHIBITION AGAINST SELF-INCRIMINATION

SCOPE AND EXTENT OF RIGHT IN GENERAL

§ 59.05 Witness's assertion of privilege

§ 59.10 —Basis for asserting privilege

Court of Appeals, 1st Cir. After defendant was convicted in district court of aiding and abetting the robbery of a federally insured bank, he appealed on the ground, among other things, that the trial court had erred in permitting a proposed defense witness to refuse to testify on Fifth Amendment grounds. The proposed witness was a co-defendant who had already pled guilty to the bank robbery and been sentenced.

The Court of Appeals for the First Circuit affirmed the conviction, holding that the co-defendant was entitled to invoke his Fifth Amendment privilege against self-incrimination and refuse to testify as a defense witness where the co-defendant's testimony would have differed substantially from statements he had made at the time he was sentenced and, thus, would have tended to incriminate him for perjury. Moreover, the court noted that the testimony would have tended to link the co-defendant to involvement in unindicted state crimes, which would have exposed him to prosecution in state courts. United States v. Albert, 773 F.2d 386 (1985), 22 CLB 164.

§ 59.20 Silence as an admission

U.S. Supreme Court After his arrest for sexual battery in Florida and having been given *Miranda* warnings, defendant exercised his right to remain silent. Defendant later pleaded not guilty by reason of insanity. In closing arguments, the prosecutor suggested that his repeated refusal to answer questions demonstrated a degree of comprehension that was inconsistent with his claim of insanity. His subsequent conviction was affirmed by the Florida Court of Appeals, and his petition for habeas corpus relief was denied in federal district court. But the Court of Appeals for the Eleventh Circuit reversed, holding that he was entitled to a new trial.

The Supreme Court affirmed, holding that the prosecutor's use of defendant's postarrest, post-Miranda warning silence as evidence of sanity violated the Due Process Clause. The Court reasoned that the use of silence against a defendant is fundamentally unfair because *Miranda* contains an implicit assurance that silence will carry no penalty. Wainwright v. Greenfield, 106 S. Ct. 634 (1986), 22 CLB 377.

60. RIGHT TO SPEEDY TRIAL

§ 60.00 In general

U.S. Supreme Court Defendant was indicted by a federal grand jury for illegal entry into the United States after having been previously convicted for the same crime "on or about December 17, 1981." The grand jury returned a superseding indictment four days before the trial was scheduled to commence that was identical to the original except that it corrected the date of the previous conviction to read "on or about December 7, 1981." Defendant moved for a continuance based upon the Speedy Trial Act, which provides that the trial shall not commence less than thirty days "from the date on which the defendant first appears through counsel." The district court denied the motion, but the court of appeals reversed the ensuing conviction, holding that the defendant was entitled to a new thirty-day trial preparation period.

The Supreme Court reversed, holding that the Speedy Trial Act does not require that the thirty-day preparation period be restarted upon the filing of a superseding indictment. The Court reasoned that Congress fixed the beginning for the trial preparation period as the first appearance of counsel not necessarily the date of indictment or filing of a superseding indictment. United States v. Rojas-Contreras, 106 S. Ct. 555 (1985), 22 CLB 377.

U.S. Supreme Court After defendants were arrested and indicted on firearms charges, the government moved to dismiss the indictment after a supression motion was granted. The Court of Appeals for the Ninth Circuit reversed the suppression motion forty-six months later, and the Supreme Court denied certiorari. On remand, the district court ordered the government to reindict on the firearms charges. It then dismissed that indictment on the grounds of vindictive prosecution.

When the court of appeals reversed, the district court dismissed the indictment on speedy trial grounds, and the court of appeals affirmed.

The Supreme Court reversed, holding that the time during which the indictment was dismissed and the defendants were free of all restrictions on their liberty should be excluded from the length of the delay considered under the Speedy Trial Clause of the Sixth Amendment. The Court explained that where no indictment is outstanding, it is only the actual restraints imposed by arrest and holding to answer a criminal charge that trigger the protection of the Speedy Trial Clause. United States v. Loud Hawk, 106 S. Ct. 648 (1986), 22 CLB 378.

§ 60.45 Right to reprosecute following dismissal

Court of Appeals, 2d Cir. After the district court found that the Speedy Trial Act had not been violated, the defendants appealed.

The Court of Appeals for the Second Circuit reversed and remanded, holding that whereas the Speedy Trial Act was violated, the dismissal should be without prejudice to refiling of the charges. The court noted that where, as here, the crime charged is serious, the sanction of dismissal with prejudice for a speedy trial violation should be imposed only for serious delay involving intentional noncompliance with the Act. United States v. Simmons, 786 F.2d 479 (1986), 22 CLB 482.